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In the Supreme Court of the United States

OCTOBER TERM, 1985

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

JOHN DOE, M.D., BY CURTIS LAVERY,
EXECUTOR OF HIS ESTATE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress waived the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, which prohibits discrimination on the basis of disability in "any program or activity conducted by any Executive agency." 29 U.S.C. 794(a) (Supp. V 1993).

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the Director of the Federal Bureau of Investigation and Richard Held, Special Agent in Charge of the San Francisco Office of the Federal Bureau of Investigation, were appellees in the proceeding below.

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The Solicitor General, on behalf of the Attorney General of the United States and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The June 30, 1995, opinion of the court of appeals (App., *infra*, 1a-9a) is not reported, but the judgment is noted at 62 F.3d 1424 (Table). The August 1, 1991, opinion of the court of appeals (App., *infra*, 22a-65a) is reported at 941 F.2d 780. The December 28, 1992, opinion of the district court (App., *infra*, 10a-21a) is reported at 814 F. Supp. 844. The August 25, 1989, opinion of the district court (App., *infra*, 66a-77a) is reported at 723 F. Supp. 452.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1995. On September 19, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a) (Supp. V 1993), provides, in relevant part:

> No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 505(a)(2) of the Act, 29 U.S.C. 794a(a)(2), provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [Section 504 of the Act].

STATEMENT

1. This case arose from the FBI's decision in 1988 to suspend the requirement that its agents and job

applicants go to a health care facility at which respondent was employed for compulsory annual physicals. The suspension decision was made after the FBI obtained information that respondent, who performed the physicals, might have AIDS. App., *infra*, 13a-14a. The FBI stopped sending agents and applicants to the facility because it was dissatisfied with the facility's response to its inquiries regarding respondent's medical condition. *Id.* at 13a-15a. Eventually, the FBI decided to allow its agents to choose any of three health care facilities, including respondent's facility, for their annual physicals. Thereafter, very few agents and applicants went to respondent for compulsory physicals. Respondent's salary, which was based in part on the number of physicals he performed, decreased sharply. *Id.* at 25a.

Respondent brought an action for injunctive relief and money damages against the Attorney General of the United States and the Director of the Federal Bureau of Investigation under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1988 & Supp. V 1993), and the Fifth Amendment. Respondent included a *Bivens* claim for damages against the Special Agent in Charge of the San Francisco FBI Office, Richard Held. Section 504(a) provides, in relevant part, that

> [n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity

> conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794(a) (Supp. V 1993).

The district court granted FBI agent Held qualified immunity. App., *infra*, 53a-54a. The court also held that the FBI's actions did not violate the Fifth Amendment because its actions were reasonable in light of the FBI's governmental responsibilities. *Id.* at 75a-77a. With regard to the Section 504 claim, the district court held that there is no implied cause of action against the federal government for violations of Section 504. *Id.* at 68a-75a.

2. The court of appeals affirmed in part and reversed in part. App., *infra*, 22a-65a. The court ruled that respondent's claims for injunctive relief were moot due to respondent's resignation from the hospital staff. *Id.* at 26a-27a. The court affirmed the district court's ruling that the individual special agent was entitled to qualified immunity. *Id.* at 59a. With regard to the Section 504 claim against the government, the court held that Congress unequivocally waived the federal government's sovereign immunity against money damages for violations of Section 504. *Id.* at 48a, 53a. The court found a waiver in Congress's amendment of the Rehabilitation Act in 1978 to include executive agencies in the coverage of Section 504. *Id.* at 41a-43a. The court of appeals relied on its assumption that Congress knew, at the time of the amendments, that an implied right of action existed against federal aid recipients under Section 504 and other analogous statutes. *Id.* at 32a-36a.[1]

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[1] See 42 U.S.C. 2000d (Title VI of the Civil Rights Act of 1964); 20 U.S.C. 1681 (Title IX of the Education Amendments of 1972).

The court held that Congress intended to ensure an enforcement mechanism for victims of disability discrimination that would be uniform against private and federal defendants alike. The legislative history reflected the same intent, in the court's view, even though the congressional committee reports made no reference to why Congress inserted the "Executive agency" clause into Section 504 and the debates "do not state outright that section 504 subjects federal agencies to private actions for damages." *Id.* at 48a. The court also viewed the attorneys' fees provision of the Rehabilitation Act, 29 U.S.C. 794a(b), as supporting Congress's intent to place government and private defendants on an equal footing. App., *infra*, 46a-48a.

3. On remand, the district court proceeded to the merits of respondent's damages claim and addressed the question whether the FBI's actions constituted discrimination on the basis of disability in violation of Section 504. App., *infra*, 11a. The court applied Ninth Circuit precedent that places the burden on a defendant to make an adequate inquiry into whether a person is otherwise qualified to perform a job before it may take an adverse action based on a determination that the person is not otherwise qualified. See *Mantolete* v. *Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985). The court indicated that there is not a significant risk of infection by a physician who has AIDS if the physician follows infection control procedures. App., *infra*, 16a. The district court ruled in favor of the government, however, holding that the FBI did not violate Section 504 because the FBI had a right to inquire into respondent's qualifications and the hospital's answers to its questions regarding

health risks posed by respondent were inadequate. *Id.* at 20a-21a.

4. The court of appeals reversed. App., *infra*, 1a-9a.[2] The court held that the district court's findings that the FBI made an adequate inquiry into respondent's qualifications, and that the hospital gave evasive answers, were clearly erroneous. *Id.* at 7a. Chief Judge Wallace dissented because he disagreed that the findings were clearly erroneous and he would have adhered to the court's earlier opinion. *Id.* at 9a.

REASONS FOR GRANTING THE PETITION

1. This case presents the question whether Congress has waived the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1988 & Supp. V 1993). A petition for a writ of certiorari was filed on September 5, 1995, in *Lane* v. *Peña*, No. 95-365, seeking review of a decision of the D.C. Circuit raising the same issue. In *Lane*, the court of appeals held that Congress had not waived sovereign immunity against money damages for violations of Section 504. We have filed a brief in *Lane*, stating that we believe that review by the Court is warranted in that case in order to resolve the conflict among the circuits. We request that the Court hold the petition for a writ of certiorari in the instant case and dispose of it as appropriate in light of the Court's disposition of the petition in *Lane*.

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[2] The court of appeals initially issued an opinion affirming the district court, 34 F.3d 781, which was withdrawn and superseded by another opinion affirming the district court, 44 F.3d 715. The court of appeals then withdrew that opinion and issued its final opinion reversing the district court.

2. In *Lane*, the D.C. Circuit summarily affirmed the district court's ruling that Congress had not waived the federal government's sovereign immunity against money damages for violations of Section 504. The district court had based its decision on the D.C. Circuit's earlier ruling to that effect in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (1994). In *Dorsey*, the court applied this Court's sovereign immunity jurisprudence, see *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), requiring that a waiver of sovereign immunity for money damages must be explicit and unambiguous. See 41 F.3d at 1554-1555. The court found no such explicit language in Section 504 or Section 505 of the Rehabilitation Act. *Ibid.* The court noted that Section 505 explicitly incorporates the remedies of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, for violations of Section 504, 41 F.3d at 1554, but it found no explicit waiver of sovereign immunity against money damages in Title VI, *id.* at 1555. The court emphasized that the fact "[t]hat damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing [from] private parties." *Id.* at 1555. In examining the legislative history of Section 504, the court found it "at the very best * * * ambiguous." *Ibid.* The court expressly recognized that its decision respecting liability for damages for violations of Section 504 was in conflict with the Ninth Circuit's decision in the instant case. *Id.* at 1555.[3]

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[3] In *Dorsey*, the D.C. Circuit noted that neither Section 504

3. As we submit in our brief in *Lane*, the Ninth Circuit's ruling in the instant case is inconsistent with basic principles governing the federal government's sovereign immunity against money damages. It is well settled that waivers of sovereign immunity must be unequivocally expressed and not implied. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); see also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242-243 (1985). This Court recently reaffirmed that waivers of sovereign immunity must not be enlarged beyond what the statutory language requires, and that, for money damages to be available, waiver must unambiguously extend to monetary claims as well. *Nordic Village, Inc.*, 503 U.S. at 33-34. Nor can the legislative history of a statute supply an unequivocal waiver that does not exist in the statute itself—"the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *Id.* at 37.

The D.C. Circuit correctly ruled in *Dorsey* that Congress did not explicitly waive the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act. Section 504(a) of the Act bars federal aid recipients

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nor Title VI expressly provides for a right of action for compensatory damages. 41 F.3d at 1554. The court of appeals in this case held that an implied cause of action exists for damages for violations of Section 504. App., *infra*, 48a, 53a. The *Dorsey* court did not find a need to resolve that issue because it concluded that "[e]ven if there is an implied right of action for damages under Title VI, and thus under § 504, it cannot exist as against the federal government." 41 F.3d at 1554-1555.

and federal executive agencies from discriminating on the basis of disability in programs and activities. Section 504(a) provides, in relevant part, that

> [n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794(a) (Supp. V 1993).

Section 505(a)(2) of the Act specifies the remedies available for violations of Section 504. It provides that

> [t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [Section 504 of the Act].

29 U.S.C. 794a(a)(2).

Title VI of the Civil Rights Act of 1964 prohibits programs receiving federal financial assistance from discriminating on the basis of race, color or national origin. 42 U.S.C. 2000d.[4] Title VI contains no pro-

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[4] Section 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

vision specifying remedies against recipients of federal financial assistance who engage in discrimination other than in Section 2000d-7, which was enacted in 1986 to waive the States' Eleventh Amendment immunity. That Section provides that remedies in suits against States are available to the same extent as available against any public or private entities. The remedial provisions of Title VI generally deal with the authority and responsibilities of federal agencies that extend financial assistance to enforce Title VI.

Neither the Rehabilitation Act nor Title VI thus contains an explicit waiver of the federal government's sovereign immunity against money damages for violations of Section 504. In the remedies provision of Section 505(a)(2), Congress did not refer to persons aggrieved by acts of executive agencies. The absence of an express waiver for money damages for violations of Section 504 by executive agencies is especially obvious in light of the remedies provided for violation of Section 501 of the Act, 29 U.S.C. 791 (1988 & Supp. V 1993). Section 501 governs the federal government's liability for employment discrimination based on disability. See, *e.g.*, *Johnston* v. *Horne*, 875 F.2d 1415, 1418-1420 (9th Cir. 1989). With respect to violations of Section 501, Section 505(a)(1) of the Act provides that any aggrieved employee or applicant for employment is entitled to the remedies, rights, and procedures provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (1988 & Supp. V 1993). 29 U.S.C. 794a(a)(1). Prior to 1991, Title VII did not authorize any awards of compensatory damages. In 1991, however, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, which provides that compen-

satory damages are available for unlawful intentional discrimination with respect to employment practices under Title VII and the Rehabilitation Act, 29 U.S.C. 794a(a)(1). 42 U.S.C. 1981a(a)(1) and (2) (Supp. V 1993). In the 1991 Act, Congress thus for the first time waived immunity for compensatory damages for intentional discrimination in violation of Section 501. No similar waiver has ever been enacted with respect to Section 504.

The court of appeals' decision in this case came before this Court's decision in *Nordic Village, Inc.*, 503 U.S. at 33-34, holding that the requirement of an explicit statutory waiver applies to any aspect of the waiver, including waiver for monetary damages.[5] Application of that principle to Section 504 demonstrates that the ruling by the Ninth Circuit below is incorrect and that the D.C. Circuit's holdings in *Dorsey* and *Lane* were correct. This Court's disposition of the petition in *Lane* should therefore resolve the issues in this case.

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[5] In *J.L.* v. *Social Security Admin.*, 971 F.2d 260 (1992), decided after *Nordic Village*, the Ninth Circuit adhered to its ruling in *Doe* that Section 504 waived sovereign immunity for money damages for violations of Section 504. *Id.* at 264, 269.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition in *Lane* v. *Peña*, No. 95-365.

Respectfully submitted.

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NOVEMBER 1995

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15253

D.C. No. CV-88-03820-CAL

JOHN DOE, M.D., BY CURTIS LAVERY, EXECUTOR OF HIS ESTATE, PLAINTIFF-APPELLANT

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of California

Charles A. Legge, District Judge, Presiding

[Filed June 30, 1995]

Before: WALLACE, Chief Judge; O'SCANNLAIN, Circuit Judge; and KELLEHER,* District Judge.

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* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

MEMORANDUM**

I

Dr. Doe, who died in 1992, was a medical doctor and director of a health facility which contracted to perform physical examinations for agents of the Federal Bureau of Investigation ("FBI"). In 1988, the FBI was told by an unnamed source that Dr. Doe had Kaposi's Sarcoma, a malignancy often associated with Acquired Immune Deficiency Syndrome ("AIDS"). The FBI asked Dr. Doe and the facility if Dr. Doe had AIDS. Dr. Doe and the facility would not confirm that he had AIDS, but assured the FBI that they followed standard infection control procedures; therefore, Dr. Doe's routine exams posed no risk to patients. Within a week, however, the FBI stopped sending agents to Dr. Doe.

This case comes to us for the second time on appeal. On remand, the district court, after a nonjury trial, rejected Dr. Doe's claim for damages under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("the Act"). The executor of Dr. Doe's estate appeals.

II

The interpretation of the Act is a question of law that we review de novo. However, we review the district court's findings of fact for clear error.

At the time this action was filed, section 504 of the act, 29 U.S.C. § 794(a), provided:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his

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** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

> handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.

The goal of section 504 is to protect disabled individuals "from deprivation based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns . . . as avoiding exposing others to significant health and safety risks." *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

In order to recover, Dr. Doe must show that he was an otherwise qualified handicapped individual for purposes of the Act, and that he was terminated solely because of his handicap. The first time that his case was before us, we determined that Dr. Doe was a "handicapped individual" within the meaning of the Act. *Doe v. Attorney General*, 941 F.2d 780, 797 (9th Cir. 1991). We now must determine whether he was "otherwise qualified" to perform routine physicals, and if so, whether he was terminated solely by reason of his handicap.

A

The Supreme Court has held that a person with an infectious disease is otherwise qualified for a position if he does not pose "a significant risk of communicating [the] disease to others in the workplace." *Arline*, 480 U.S. at 287 n.16. Here, the district court found that "if appropriate medical procedures are followed, . . . the risk of transmission of infection from a doctor with AIDs to a patient in the course of a routine physical examination is remote." This conclusion was supported by unanimous expert testimony at trial.

The district court nevertheless found in favor of the FBI. The district court found that Dr. Doe and the hospital gave "conclusory statements" in response to the questions posed by the FBI, and that this "minimal information" prevented the FBI from determining whether Dr. Doe was "otherwise qualified" for the position. However, we must conclude that the district court's finding is not supported by the record.

Before taking adverse action against an employee, an employer has a duty under the Act to gather sufficient information from the employee and from qualified experts to determine whether the employee is otherwise qualified for the position. *Mantolete v. Bolger*, 767 F.2d 1416, 1423 (9th Cir. 1985). Because Dr. Doe had a contagious disease, the FBI's concern under the Act should have been to determine whether Dr. Doe posed a substantial risk of communicating the disease. It would have been perfectly appropriate, therefore, for the FBI to inquire in detail about the infection control procedures used to ensure that FBI employees were not placed at risk.

The district court record reveals, however, that the FBI expressed little concern about the hospital's infection control procedures. The record shows that Dr. Doe and the hospital were entirely forthcoming about these procedures, but that their explanations fell on deaf ears. When the hospital explained why its infection control procedures prevented risk of transmission to any agents, the FBI showed no interest in pursuing the inquiry further, by asking, for instance, about the nature, character, use, or effectiveness of the procedures. Rather, the FBI

focused their attention on only one question: whether or not Dr. Doe had AIDS.[1]

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[1] The direct testimony of FBI Agent Clow about a meeting between the FBI and hospital staff members is revealing:

> A: At that point a discussion ensued in which basically a number of people, including Dr. Doe, *assured us that if medical guidelines were followed, there would be no risk to our employees* that this would be the case.
>
> Q: What discussion do you recall about the medical guidelines?
>
> A: It was in the context of the nature of the examinations themselves, that went to rectal examinations for males, pelvic examinations for females.
>
> And that if the guidelines, and I don't remember if any particular agency's guidelines were specified, but *if the medical guidelines were followed, they were being assured basically that there would be no risk that would accrue to our employees.*
>
> And further that possibly through AIDS education any fears that our employees might have in that regard could be allayed, and the suggestion was made that we avail our employees of that type of education.
>
> Q: Do you recall any other topics being discussed at the September 7 meeting?
>
> A: It was at some point in the discussion that . . . again, everything is being discussed hypothetically, if this being the case, we were *told there would be no risk to our employees.* . . . If it not be the case that a health care worker with the [hospital] has this disease, then all of this discussion is really moot.
>
> *And I asked point blank is there a member of the [hospital] who has this disease.*
>
> Q: Did anyone respond?
>
> A: Mr. Monardo responded. He was the only one who did, and he said, I don't know.
>
> Q: Did anyone else respond?

Indeed, the district court's findings on the nature of the FBI's inquiries accord with this view. The district court found that at an August 23, 1988 meeting between Dr. Doe and Agent Young, Dr. Doe did not confirm or deny whether anyone at the hospital either had a communicable disease or Kaposi's Sarcoma, "*but did say that there was no medical risk.*" The district court further found that on or about the same day, the FBI suspended Dr. Doe's employment "because of [its] concerns about a possible communicable disease and lack of information from plaintiff, the facility and the hospital."

The FBI concedes that they were informed that there was no risk to FBI employees because infection control procedures were followed; however, they

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A: No one else said anything to that.

Q: What happened at that point?

A: Well, I felt a loss of confidence in the people who were present at the meeting, not being responsive to my concern and to the . . . one of the purposes of our visit, announced purpose of the visit, and further that they were not being candid with us.

(emphasis added).

The testimony of the hospital's clinical director, Nora Crans, also reveals that the FBI learned that Dr. Doe was using standard infection control procedures. Crans referred the FBI special agent to Dr. Doe directly. They later spoke about that conservation.

Q: Can you tell me what you recall of that conversation?

A: Yes. I asked him how the meeting went with Dr. Doe. He stated that it was somewhat puzzling. That he never came out and said whether he did or whether he didn't have KS, but said that he was following the CDC guidelines and that there was no risk of anyone on our staff passing on an infectious disease through a physical exam.

assert that "[n]o other information was provided by Dr. Doe or the hospital administrators." The FBI, however, misconceives its role under the Act. As employer, the FBI had the duty to gather substantial information based on objective evidence of risk and not on misinformed stereotypes. *Mantolete* 767 F.2d at 1423. If the FBI had been legitimately concerned about the risk of transmission, it would have inquired as to the character and effectiveness of the infection control procedures used, as it was required to do by the Rehabilitation Act. It made no attempt to do so.[2]

In sum, the district court record is devoid of any evidence indicating that the hospital or Dr. Doe were not candid with respect to questions posed about infection control. Rather, the record reveals that they were evasive only with respect to answering whether or not Dr. Doe had AIDS. Because this latter question is irrelevant to the determination of whether Dr. Doe was "otherwise qualified" under the Act, and because the FBI made no attempt to satisfy its duty to gather evidence on the issue, we conclude that Dr. Doe was otherwise qualified.

B

We now consider whether Dr. Doe was terminated "solely by reason of . . . his handicap." 29 U.S.C. § 794(a). The district court found that the FBI's

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[2] Indeed, had the FBI made the appropriate inquiries, it likely would have learned early on that the hospital had an inadequate monitoring and supervision program for its infection control procedures. The FBI then may have been able to part ways with Dr. Doe without effecting a violation of the Rehabilitation Act. This information was not adduced until after Dr. Doe filed suit, however, and therefore cannot be a retroactive basis for the FBI's termination of Dr. Doe. *McKennon v. Nashville Banner Publishing*, 115 S. Ct. 879, 884 (1995).

> decision to use other health care providers was not based solely on plaintiff's handicap. It was at least in part based on plaintiff's refusal to provide information. His conclusory statements did not inform defendants as to whether plaintiff had a handicapping condition, and they prohibited defendant from determining whether plaintiff was "otherwise qualified or what reasonable accommodations could be made.

Dr. Doe asks us to hold that the district court improperly defined the phrase "solely by reason of his handicap" when it found, in essence, that a section 504 violation does not occur if a defendant has both proper and improper motives for terminating a handicapped employee. However, we have no need to reach that question here because the FBI has not asserted any legitimate reasons for terminating Dr. Doe.

The district court found that the FBI terminated Dr. Doe, not merely because of his handicap, but also because he refused to provide the FBI with information. As stated above, the "missing" information pertained not to infection control procedures, but to whether or not Dr. Doe had AIDS. As we have noted, this latter inquiry is irrelevant for determining whether Dr. Doe was "otherwise qualified" under the Act. Further, several witnesses testified that the purpose for asking Dr. Doe if he had AIDs was in order to replace him if he did. Hence, we cannot help but conclude that the FBI terminated Dr. Doe "solely by reason of his handicap," even as that phrase is most strictly defined.

III

We reverse the judgment of the district court and remand for a determination of damages.

REVERSED and REMANDED.

WALLACE, Chief Judge, dissenting:

I dissent. The majority, at this late date, changes its position and concludes that the district court should be reversed because its findings are clearly erroneous. Regardless of how any of us would decide the case had we been the district judge, I cannot say these findings are *clearly erroneous.*

The record shows that the FBI wanted to know if Dr. Doe had AIDS. That was never disputed. But that does not mean that the FBI fired Dr. Doe because he had the disease. Rather, the evidence is sufficient for a finding that the firing of Dr. Doe was motivated by the FBI's lost confidence in the hospital. At the very least, that *finding* is not *clearly* erroneous.

For the reasons stated in the withdrawn opinion of *Doe v. Attorney General*, 44 F.3d 715 (9th Cir. 1995), I would affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-88-3820-CAL

JOHN DOE, M.D., BY CURTIS LAVERY, EXECUTOR OF HIS ESTATE, PLAINTIFF

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

[Filed Dec. 28, 1992]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LEGGE, District Judge.

Findings of Fact

1. This case was tried to the court, sitting without a jury, between May 9 and May 17, 1989. The complaint asserts two claims. The first is under 29 U.S.C. § 794, the Rehabilitation Act of 1973, § 504 (the

"Act").[1] The second claim is that defendants used private information about plaintiff in violation of his privacy rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. This court issued findings of fact and conclusions of law on August 25, 1989. It determined that plaintiff did not have a private right of action against defendants under Section 504. This court made no other findings or conclusions regarding the Section 504 cause of action. With respect to plaintiff's claim under the Fifth Amendment, the court found that defendants did not violate his right to privacy.

3. This court's decisions were vacated in part, reversed in part, affirmed in part, and remanded by the Ninth Circuit Court of Appeals; *Doe v. Attorney General*, 941 F.2d 780 (9th Cir.1991). The Ninth Circuit held that plaintiff's claim for injunctive relief, the only claim plaintiff made under his Fifth Amendment cause of action, had become moot. It affirmed this court's judgment in favor of defendant Held. The court also held that Congress had waived sovereign immunity and had provided a private right of action for damages for discrimination claims against the United States under Section 504. It therefore reversed this court's contrary conclusion and remanded for this court to make findings on the merits.

The Ninth Circuit held that plaintiff had a "handicap" (AIDS) within the meaning of the Act. But it made no determination as to whether (1) plaintiff was "otherwise qualified" to perform medical services for defendants, (2) defendants discriminated

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[1] This section is usually referred to by its public law section number, § 504 of the Act, and that public law reference will be used here.

against plaintiff solely because he had AIDS, or (3) defendants acted because he refused to disclose information necessary to determine whether he was "otherwise qualified."

4. As a result of the Ninth Circuit's decisions, the only cause of action remaining before this court is plaintiff's claim for damages under Section 504 against the United States.

5. The parties stipulated to submit the issues to this court for decision on the record of the 1989 trial, together with additional filings. This court has reviewed the trial record, the submissions of the parties, the arguments of counsel and the applicable authorities. The court now makes these findings of fact and conclusions of law. The facts are found by a measure of a preponderance of the evidence.

6. Plaintiff died after the 1989 trial, and the executor of his estate has been submitted as the party plaintiff. However, Dr. Doe will be called "plaintiff," herein. Plaintiff was a medical doctor. He was engaged in the private practice of medicine as a doctor employed by, and the director of, a health care facility. The health care facility was controlled by a hospital.[2] Plaintiff received a salary from the facility, and his earnings were in part based upon the earnings of the facility from the patients whom plaintiff treated.

7. The Federal Bureau of Investigation requires that physical examinations, which include anal, vaginal and oral cavity examinations, be performed on all special agents and agent applicants, under the authority of 5 C.F.R. § 339.301. From approximately December 1984 to August 1988, defendants sent all

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[2] For reasons of privacy, plaintiff is called "Dr. Doe," the health care facility is called "the facility," and the hospital is called "the hospital."

persons who were applicants for employment by the F.B.I. to the facility for pre-employment physical examinations, and they sent all employees of the Bureau to the facility for annual and promotion physical examinations. Virtually all of those physical examinations were conducted by plaintiff. Prior to August 1988, no one connected with defendants was dissatisfied with the services performed by plaintiff.

8. Plaintiff contracted Acquired Immune Deficiency Syndrome. On or about August 15, 1988, an unknown person advised defendants that plaintiff had Kaposi's Sarcoma, a contagious AIDS-related illness.

9. FBI Special Agent William Young met with the Director of the facility, Norma Crans, on August 16, 1988. He told her that unsubstantiated information had come to his attention that plaintiff had Kaposi's Sarcoma. He told her that the FBI was concerned about the health risk, if any, to its agents and applicants. He also informed her that the FBI was concerned about the agents not having this information when they were getting their physical examinations. Agent Young said that this was a health related issue because it related to an examining physician having an alleged communicable disease examining the FBI agents and applicants. Ms. Crans told Agent Young that it would be essential that he meet with plaintiff and that she was not in a position to resolve the matter.

10. Agent Young met with plaintiff on August 23, 1988. Agent Young stated that unsubstantiated information had come to the attention of the FBI that a member of the staff of the facility had a communicable disease. Plaintiff asked what the disease was. Agent Young told plaintiff that it was Kaposi's Sarcoma. Plaintiff stated that he believed this information constituted a breach of medical ethics. Agent Young

responded that the information had come to the attention of the F.B.I., and they were concerned about the health risk to their agents and applicants. Plaintiff did not confirm or deny the information that someone on the staff had a communicable disease; however, he said that there was no medical risk.

11. Agent Young reported on both of his meetings to the Special Agent in Charge of the San Francisco F.B.I. office, Richard Held. They were concerned that their questions about a physician at the facility doing physical examinations while having a communicable disease were not being answered. Mr. Held was concerned that the physician who was performing physical examinations may have a communicable disease, and that the people compelled to see this physician by the FBI were not aware of the medical risks. Mr. Held asked Agents George Clow and Don Whaley to meet with plaintiff and the hospital administrators and raise the questions whether if someone at the facility had a communicable disease the FBI would be told, and what kind of options would be given to employees and applicants.

12. Mr. Held told the FBI nurse that until the issues could be resolved, examinations would be suspended. On or about August 23, 1988, defendants ceased sending persons to the facility for physical examinations, because of defendants' concerns about a possible communicable disease and lack of information from plaintiff, the facility and the hospital.

13. There were subsequent telephone communications between defendants and the facility and the hospital. On September 7, 1988 Agents Clow and Whaley attended a meeting with the administrators of the hospital and plaintiff. Also present were counsel for the hospital and counsel for plaintiff. One of the agents told those present that information had come

to the attention of the FBI that a member of the staff of the facility may have AIDS or an AIDS-related disease; and if he asked what the hospital's intentions were if the information was accurate. The FBI agents also expressed their concern about the FBI's duty to its employees concerning the risk of possible transmission of the disease. The agents also expressed their concern as to whether it was the FBI's duty to inform its employees of this information, and its responsibility to other federal agencies who were also using the facility.

Plaintiff and others stated that if medical guidelines were followed, there was no risk to FBI employees. It was also suggested that any fears that FBI employees might have could be alleviated through AIDS education; it was suggested that the FBI provide their employees with that type of education. No other information was provided by plaintiff or the hospital administrators to the FBI agents about whether plaintiff had AIDS or about the risks and the preventions.

Agent Clow again asked whether a health care worker with the facility had an AIDS-related disease. One of the administrators of the hospital responded that he did not know. No one else responded.

14. Defendants lost confidence in plaintiff, the facility and the hospital because they were not responsive to the FBI's concerns and were not being candid.

15. The FBI sought advice on the issues of medical risk, and whether it had any legal obligations to its agents, from its general counsel in Washington.

16. The FBI's questions about whether plaintiff had Kaposi's Sarcoma remained unanswered until plaintiff filed this suit. Dr. Doe filed this suit on

September 10, 1988. In an application to file a "John Doe" complaint, plaintiff alleged that he had AIDS.

17. After this court granted a preliminary injunction, defendants entered into agreements with three health care providers, including the facility, for fiscal year 1989. Defendants had lost confidence in the facility and plaintiff, and lacked information about plaintiff's condition and the risks. Defendants also recognized the FBI's legal obligations to its employees. The three purchase agreements gave FBI agents and applicants the opportunity to choose a facility for their physical examinations.

18. Contemporary medical judgment is that if appropriate medical procedures are followed, as plaintiff followed in performing physical examinations, the risk of transmission of infection from a doctor with AIDS to a patient in the course of a routine physical examination is remote. However, a doctor who has open cuts or weeping lesions should refrain from patient care, because the lesions may come in contact with a lesion or cut on the patient. If a lesion is weeping, disease could also be transmitted to a patient if it entered a patient's mucous membranes or an opening in the skin. The risk of such transmission in a routine physical examination, using the procedures followed by plaintiff, is not significant. However, the information about the risks and plaintiff's procedures were not disclosed to defendants at the time, and were not explained until the trial in this action.

19. Contemporary medical judgment is that a doctor who is infected with AIDS should inform his patients of the infection, and physicians who are asked whether they have AIDS should answer the question directly and truthfully.

20. Contemporary medical judgment is that hospitals should verify that their physicians are complying with the contagious disease guidelines of the Center for Disease Control. These guidelines include periodic monitoring and spot checking of the physicians. The CDC recommendations provide that AIDS infected health care workers should have their work assignments and patient care duties reviewed by a panel of physicians.

Plaintiff was uncertain of the application of CDC guidelines. He gave conflicting testimony on whether there was any supervision or monitoring by the facility to determine if physicians are in compliance with the CDC guidelines. During his deposition he testified that there was no supervision or monitoring by either the facility or the hospital. He described the practice at both the facility and the hospital as one of "self monitoring" by each physician. Plaintiff also testified that the facility is supervised by the hospital through unspecified infection control policies. He was not conversant with the infection control procedures that the hospital uses to supervise the facility. He also testified that the hospital may have verification procedures in place, but he was not conversant with those procedures.

21. In taking the actions described above, defendants did not act solely because of plaintiff's illness. Rather, defendants acted because plaintiff, the facility and the hospital did not answer the FBI's concerns about whether plaintiff had Kaposi's Sarcoma and about the risks and prevention, but provided only conclusory statements. As a result of the minimal information provided by plaintiff, the facility and the hospital, defendants were also unable to determine whether plaintiff was "otherwise qualified" to per-

form physical examinations for FBI agents and applicants.

Conclusions of Law

1. Section 504 of the Act prohibits defendants from discriminating against an otherwise qualified handicapped person solely because of the individual's handicap.

2. Title VII standards of proof apply to cases under the Act. *See Smith v. Barton*, 914 F.2d 1330, 1339-1340 (9th Cir.1990), cert. denied, — U.S. ——, 111 S.Ct. 2825, 115 L.Ed.2d 995 (1991).

3. The Ninth Circuit has determined that plaintiff was handicapped within the meaning of the Act. *Doe v. Attorney General*, 941 F.2d 780, 797 (9th Cir.1991).

4. A Section 504 plaintiff must show that he was discriminated against "solely by reason of" his handicap. *See Norcross v. Sneed*, 755 F.2d 113, 117 n. 5 (8th Cir.1985); *Harris v. Adams*, 873 F.2d 929, 933 (6th Cir.1989); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 825 (5th Cir.1990). This issue was not previously determined by this court or the Ninth Circuit.

5. A Section 504 plaintiff must also show that notwithstanding his handicap, he is "otherwise qualified" for the position in question. Title 29 U.S.C. § 794; *See School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 n. 17, 107 S.Ct. 1123, 1131 n. 17, 94 L.Ed.2d 307 (1987). The issue of whether plaintiff was "otherwise qualified" was not previously resolved by this court or by the Ninth Circuit. "In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question." (quoting 45 C.F.R. § 84.3(k)). Apart from plaintiff's disease, plaintiff was able to perform the essential functions of his job, and

defendants were satisfied with his performance up to August 1988.

6. If an individual's disability is a contagious disease, he is not "otherwise qualified" if he poses a significant risk of communicating the disease to others in the workplace. An employer can consider the risks posed by a physician's contagious disease in determining whether he is "otherwise qualified" to perform physical examinations. The Act permits an employer to make inquiry about an individual's disability if the information sought is relevant to his ability to do the job or to the safety of patients or coworkers. *See Carter v. Casa Cent.*, 849 F.2d 1048, 1056 (7th Cir.1988). *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n. 16, 107 S.Ct. 1123, 1131 n. 16, 94 L.Ed.2d 307 (1987). This determination requires an individualized inquiry. *Chalk v. United States Dist. Court Cent. Dist. of California*, 840 F.2d 701, 705 (9th Cir.1988).

7. The individualized inquiry requires findings based on reasonable medical judgment, given the present state of medical knowledge, about four factors:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Arline, 480 U.S. at 288, 107 S.Ct. at 1131. *Chalk*, 840 F.2d at 705. The risk of transmission of a disease in a routine physical examination, using the procedures followed by plaintiff, is not significant. However, the information about the risks and plaintiff's procedures

were not disclosed to defendants at the time, and were not explained until the trial in this action.

8. If a plaintiff doctor will not allow the inquiry necessary to determine whether his disease poses a significant risk to patients, he is not "otherwise qualified" for employment. *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d at 827-830.

9. The Act does not require that defendants dispense with all reasonable precautions or requirements in order to ensure the participation of a handicapped person. *Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir.1981). Section 504 simply requires even-handed treatment of the handicapped person who otherwise meets the employment standards "so that he or she will not be discriminated against *solely* because of the handicap." *Id.*

10. Section 504 requires defendants to make reasonable accommodations to an "otherwise qualified" handicapped employee. An agency can only accommodate an individual based on "what is known about the individual's handicapping condition." *Langon v. United States Dept. of Health and Human Services*, 749 F.Supp. 1, 6 (D.D.C.1990). When a plaintiff refuses to provide information regarding his communicable disease, he prevents defendants from knowing if he has a communicable disease and from deciding what, if any, reasonable measures could protect the patients from the transmission of disease. "In other words, [the physician] prevented [the referring agency] from knowing whether he had a handicap for which federal law arguably required reasonable accommodations." *Leckelt*, 909 F.2d at 830.

11. Defendants' decision to use other health care providers was not based solely on plaintiff's handicap. It was at least in part based on plaintiff's refusal to

provide information. His conclusory statements did not inform defendants as to whether plaintiff had a handicapping condition, and they prohibited defendants from determining whether plaintiff was "otherwise qualified" or what reasonable accommodations could be made.

12. Accordingly, the court concludes that judgment should be entered in favor of defendants.

13. Any findings of fact that are in effect conclusions of law should be considered as such. Any conclusions of law that are findings of fact should be deemed findings of fact.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-15933, 89-16134

JOHN DOE, PLAINTIFF-APPELLANT

v.

ATTORNEY GENERAL OF THE UNITED STATES; THE DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; RICHARD HELD, SPECIAL AGENT IN CHARGE OF THE SAN FRANCISCO OFFICE, FEDERAL BUREAU OF INVESTIGATION,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of California

[Filed Aug. 1, 1991]

Before: CHOY and FLETCHER, Circuit Judges, and FITZGERALD, District Judge.*

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* Hon. James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

FLETCHER, Circuit Judge:

John Doe appeals district court judgments (1) holding that there is no private cause of action against the United States under section 504 of the Rehabilitation Act, (2) holding that the defendants did not violate Doe's right to privacy, and, (3) granting an individual defendant qualified immunity. On appeal, the case presents issues of mootness, jurisdiction, sovereign immunity, and qualified immunity.

FACTS

John Doe was a physician and director of a clinic owned and operated by a hospital.[1] Between December 1984 and August 1988, the San Francisco office of the Federal Bureau of Investigation (FBI), under an annually renewed procurement contract, sent all of its agents to the clinic for annual physical examinations and all of its potential agents there for pre-hiring examinations. Doe performed virtually all of the physical examinations, and his salary was based in part on the number of the examinations that he did.

Doe has AIDS.[2] On about August 15, 1988, an unidentified third party told the FBI that Doe had Kaposi's sarcoma, a cancerous skin disease often contracted by persons with AIDS. The FBI asked Doe if he had AIDS. He would not confirm that he did but assured the FBI that his routine exams posed no

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[1] The district court permitted the plaintiff to file a "John Doe" complaint to protect his privacy. For the same reason, the court did not use the proper names of the health care facilities within which he worked. We continue the practice of protecting his anonymity by referring to the plaintiff as John Doe and the health care facilities as the "hospital" and the "clinic."

[2] Acquired Immune Deficiency Syndrome, caused by the Human Immunodeficiency Virus (HIV).

risk to the patients. The FBI, evidently not satisfied, stopped sending agents and applicants to Doe on August 23 because of concern about his illness. Richard Held, Special Agent in Charge of the San Francisco Office of the FBI, reached this decision because Doe would not refute the allegation that he had AIDS, provide a different doctor to do the exams, or agree to tell the agents that he had AIDS and let them decide whether to permit his examination.

Amidst ongoing discussions among the FBI, Doe, and the hospital, the FBI asked hospital representatives and the FBI's Assistant Director of Administrative Services about risk. The hospital representatives said there was none; the Assistant Director did not answer the question. The FBI also consulted its lawyers. It did not consult with any independent medical authority about the potential risk. Doe, hospital and clinic officials, and FBI personnel met on September 7; the FBI still wanted to know if Doe had AIDS. Doe and the hospital still would not confirm or refute the allegation but told the FBI that Doe's examinations posed no risk to FBI agents and applicants. They told the FBI specifically that Doe adhered to the Centers for Disease Control (CDC) and American Medical Association guidelines for infection control.

On September 30, Doe sued the Attorney General of the United States, the Director of the FBI, and Agent Held. He sought temporary relief and a permanent injunction restraining the FBI from (1) entering into an agreement with anyone but Doe's hospital to perform the physicals, (2) sending the agents or applicants to anyone but the hospital because of Doe's handicap, (3) revealing to anyone that Doe was handicapped or that the handicap was AIDS, and (4) discouraging other federal agencies from using Doe's

or the hospital's services. Doe also sought money damages and attorneys' fees.

The district court granted a preliminary injunction preventing the FBI from disclosing Doe's condition and from refusing to send agents and applicants to the clinic. The FBI responded by arranging with three different health care organizations, including Doe's, to provide physical examinations. Before the FBI stopped sending people to the clinic, Doe had done 30-40 physicals per month. After the preliminary injunction, he saw about five FBI patients per month.

On April 5, 1989, the district court granted summary judgment in favor of Agent Held on the ground of qualified immunity. The district court held a trial between May 9 and May 17. On August 25, 1989, the district court issued its published opinion on the remainder of the case. *Doe v. Attorney General*, 723 F.Supp. 452 (N.D.Cal.1989).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction of the appeal under 28 U.S.C. § 1291.

STANDARD OF REVIEW

The decision that there is no cause of action against the government under section 504 of the Rehabilitation Act is a legal question reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.1984) (en banc). The district court's findings of fact can be reversed only if clearly erroneous. *Id.* Review of the district court's decision that Held is entitled to qualified immunity is *de novo*. *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir.1989), *cert. denied*, — U.S. ——, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990).

DISCUSSION

I. MOOTNESS

The government contends that Doe's injunctive claims are moot. A few days after the district court decision, Doe was stricken with CMV retinitis, which seriously impaired his vision. He resigned from the hospital staff for reasons of disability. By the time of oral argument before our court on May 17, 1990, his vision had improved so that he could have resumed full-time work but for recurrent bouts of extreme fatigue. Doe's physician informed his lawyers that it was "extremely unlikely that he would be able to resume work full time." Appellant's Opening Brief at 5 n. 3.

Doe claims that one of the injuries he alleged at trial, distress that his coworkers' jobs are in jeopardy because of the discrimination against him, could be remedied by an injunction requiring the FBI to continue sending agents to the clinic for physicals. The hospital is not a party to the suit, however, and Doe has no standing to seek an injunction requiring the FBI to send agents to the clinic when Doe has resigned his position there.

Doe claims that even if his injunctive claims are moot, he is entitled to declaratory relief, citing *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1113 (9th Cir.1987). The plaintiff in *Zolin*, however, sought declaratory relief in the complaint. When the court ruled the injunctive claim moot, it remanded for a ruling on the claim for declaratory relief. Doe did not seek declaratory relief in his complaint, and he cannot, in effect, amend it now.

The capable-of-repetition-yet-evading-review exception in mootness doctrine also does not save Doe's injunctive claims. This exception provides only minimal protection to individual plaintiffs. Under *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 348-49, 46 L.Ed.2d 350 (1975) (per curiam), the challenged action must be too short in duration "to be fully litigated prior to its cessation or expiration," and there must be "a reasonable expectation that the same complaining party would be subject to the same action again." Persons with AIDS complaining about discrimination against them because of their disease fit the evading-review requirement. They will usually become disabled or even die before a civil action can traverse the entire judicial field. Doe cannot show, however, that we can reasonably expect him to be subject to the same FBI action in the future. By his own admission, he will not return to work. His injunctive claims are therefore moot.

II. JURISDICTION

Although the injunctive claims are moot, we remain confronted with Doe's damage claims. First we must consider the jurisdiction of the district court to adjudicate these claims. Under the Tucker Act, 28 U.S.C. § 1491(a), the Court of Claims has exclusive jurisdiction over all damage claims against the federal government "in cases not sounding in tort."[3] A discrimination claim under the Rehabilitation Act does sound in tort, however, not contract.

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[3] "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Supreme Court's approach to statutes of limitations for the federal civil rights laws are instructive. In *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62, 107 S.Ct. 2617, 2620-22, 96 L.Ed.2d 572 (1987), the Supreme Court addressed the issue of what statute of limitations should apply to actions under 42 U.S.C. § 1981. Section 1981 prohibits discrimination in making and enforcing contracts and other activities. Like 42 U.S.C. §§ 1982 and 1983, which prohibit discrimination in property rights matters and under color of state law, respectively, section 1981 does not contain its own statute of limitations; federal courts are to apply "the most appropriate or analogous state statute of limitations." *Id.* at 660, 107 S.Ct. at 2620. In *Wilson v. Garcia*, 471 U.S. 261, 266-68, 105 S.Ct. 1938, 1941-43, 85 L.Ed.2d 254 (1985), the Supreme Court had decided that the state statute of limitations for personal injury claims is most appropriate to and must be applied in section 1983 actions. In *Goodman*, the appellant argued that because section 1981 dealt "primarily with economic rights, more specifically the execution and enforcement of contracts," the more appropriate statute of limitations is the one applicable to suits for interference with contractual rights.

The Court disagreed, holding that the personal injury statute must be applied also in section 1981 actions. *Id.* at 661, 107 S.Ct. at 2621. The Court reasoned,

> Insofar as [section 1981] deals with contracts, it declares the personal right to make and enforce contracts, a right, as the section has been construed, that may not be interfered with on racial grounds. The provision asserts, in effect, that competence and capacity to contract shall not depend upon race. It is thus part of a federal law

> barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person. . . . That § 1981 has far-reaching economic consequences does not change [the] conclusion [that § 1981 claims should also be characterized as personal injury claims], since such impact flows from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference.

Id. at 661-62, 107 S.Ct. at 2621.

The Seventh Circuit has also held recently that "the rights that antidiscrimination laws such as Title VII and section 1981 and their state equivalents confer on employees are not contract rights. . . . [They] are a species of tort right." *McKnight v. General Motors Corp.*, 908 F.2d 104, 112 (7th Cir.1990) Doe is not an employee of the FBI; he is claiming in effect as a third-party beneficiary of the contract between the FBI and the hospital that the FBI discriminated against him in ceasing to send FBI recruits and agents to the clinic for their physicals. Under the Supreme Court's reasoning in *Goodman*, however, his discrimination allegation, though related to a contract, should be characterized as a personal injury claim, not a contract claim.[4] Doe's damage claims against the government therefore need not be heard in the Court of Claims; the district court

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[4] We note that in no other case under the federal civil rights laws is the person alleging discrimination restricted from being heard in a district court (aside from fulfilling an initial requirement in some cases that administrative remedies be exhausted). We doubt that Congress intended to require discrimination victims, persons who often have limited financial resources, to file their claims against the government in a court located in Washington, D.C., rather than permitting them to file in the district court where they live.

had jurisdiction to decide them, and we have jurisdiction to review its decision.

III. SOVEREIGN IMMUNITY UNDER THE REHABILITATION ACT

The government asserts that the doctrine of sovereign immunity cloaks the FBI with immunity from a damages suit for violation of section 504 of the Rehabilitation Act. Before discussing whether the government has waived its sovereign immunity, we will lay the substantive groundwork by reviewing section 504's protection of the handicapped and the remedies available for its enforcement.

A. *Section 504*

Section 504 of the Rehabilitation Act of 1973, as amended and codified at 29 U.S.C. ¶ 794(a), states:

> No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service.*

(Emphasis added.) The paragraph continues to direct the heads of executive agencies to promulgate regulations, after receiving congressional approval, to carry out the Act. The emphasized clause and the direction to issue regulations are amendments passed in 1978. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub.L. No. 95-602, § 119, 92 Stat. 2955, 2982. The 1978 Act was a comprehensive re-evaluation of the 1973 Act whose purpose was to "extend and strengthen" the 1973 Act programs. H.R.Rep. No. 1149, 95th

Cong., 2d Sess. 1, *reprinted in* 1978 U.S.Code Cong. & Admin.News 7312, 7312; *see also* H.R.Rep. No. 1188, 95th Cong., 2d Sess. 1, 1978 U.S.Code Cong. & Admin. News 7355, 7355 (purpose to "revise and extend" the 1973 Act programs); H.R.Conf.Rep. No. 1780, 95th Cong., 2d Sess. 65, 1978 U.S.Code Cong. & Admin. News 7375, 7375 (purpose to extend and establish additional programs).

Doe relies on the section 504 clause added by the amendment, which prohibits discrimination "under any program or activity conducted by any Executive agency," not on the pre-existing clause, which prohibits discrimination "under any program or activity receiving Federal financial assistance." The pre-amendment version does not protect Doe from the FBI's alleged discrimination: the arrangement between the FBI and the hospital is a procurement contract, specifically excluded from the definition of "federal financial assistance." 28 C.F.R. § 41.3(e) (1990). With the 1978 amendment, however, Congress intended to close this loophole, subjecting federal agencies to section 504's nondiscrimination requirement. *See* 124 Cong.Rec. 13,901 (1978) (statement of Rep. Jeffords) (eliminates federal government's exemption); *id.* at 38,549 (statement of Rep. Brademas) (requires federal compliance); *id.* at 38,551 (statement of Rep. Jeffords) (eliminates federal government's exemption); *id.* at 38,552 (statement of Rep. Sarasin) (extends coverage to federal government). The Justice Department has issued regulations enforcing section 504 that prohibit discrimination on the basis of handicap. 28 C.F.R. § 39.130(b) (1990). Regulation (b)(5) states specifically, "The agency, in the selection of procurement contractors, may not use criteria that subject

qualified handicapped persons to discrimination on the basis of handicap."

Section 504 originally did not provide an explicit remedy for the proscribed discrimination. Prior to the 1978 amendment, however, several courts had implied a private right of action. *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir.1978), *rev'd on other grounds*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979); *Leary v. Crapsey*, 566 F.2d 863 (2d Cir.1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir.1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir.1977).[5] The congressional debate on the amendments demonstrates that Congress knew that the courts had interpreted section 504 to provide this means of enforcement. 124 Cong.Rec. 37,508 (statement of Sen. Stafford) ("[t]o date we have permitted certain private enforcement of Title V"[6]).[7]

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[5] The Ninth Circuit agreed in *Kling v. County of Los Angeles*, 633 F.2d 876, 878 (9th Cir.1980), as did the Fifth Circuit in *Camenisch v. University of Texas*, 616 F.2d 127, 131 (5th Cir.1980).

[6] Title V includes the Rehabilitation Act's nondiscrimination provisions. Section 501 prohibits discrimination in employment, including that by the federal government. Section 502 establishes a mechanism for ensuring compliance with laws dealing with architectural and transportation barriers to mainstreaming persons with handicaps. Section 503 prohibits discrimination by federal contractors. Section 504, at issue here, broadly prohibits discrimination in programs conducted by the federal government or receiving federal financial assistance.

[7] It is also appropriate for us to assume that Congress knew the then-existing state of the law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379, 102 S.Ct. 1825, 1839-40, 72 L.Ed.2d 182 (1982); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 560 (1979) ("[i]t is always appropriate to assume that our

In 1978, Congress also added section 505, a remedy provision, to the Rehabilitation Act.[8] Section 505(a)(2) grants the "remedies, procedures, and rights" available under Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d to 2000d-2, to persons "aggrieved by any act or failure to act by any recipient of Federal financial assistance or Federal provider of such assistance under [section 504]."[9] Section 2000d, Title VI's central provision, prohibits discrimination based on race "under any program or activity receiving Federal financial assistance."[10] Section 2000d-1 sets forth the administrative requirements for federal departments and agencies that manage federal financial assistance programs. Section 2000d-2 provides judicial and administrative remedies for persons challenging department or agency action taken under section 2000d-1.[11] Con-

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elected representatives, like other citizens, know the law"); *Citizens Comm. to Save the Land Grant Railroads v. Burlington Northern, Inc.* 708 F.2d 1430, 1433 n. 3 (9th Cir.1982) (dicta).

[8] Codified at 29 U.S.C. § 794a.

[9] Section 505(a)(1) grants the "remedies, procedures, and rights" available under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, to aggrieved employees or applicants for employment under section 501 of the Rehabilitation Act.

[10] No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[11] Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to comply with any

gress originally modeled section 504 on Title VI and on Title IX of the Education Amendments of 1972. *Kling*, 633 F.2d at 878 n. 3. Title IX prohibits discrimination based on sex "under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681, and was itself modeled on Title VI.[12] *Cannon*, 441 U.S. at 694, 99 S.Ct. at 1956. In the congressional debates on section 505, Senator Bayh asked and Senator Cranston confirmed that "section 505 merely extends to the handicapped the same remedies, procedures and rights already extended" through Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. 124 Cong.Rec. 30,349. Neither Title VI nor Title IX, like pre-1978 section 504, grants an express private right of action to people alleging discrimination under the Acts. They provide only for review of the administrative and regulatory actions taken by an agency in administering its funding programs.[13] Also, like section 504, however,

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requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved . . . may obtain judicial review of such action in accordance with [the Administrative Procedure Act, 5 U.S.C. § 702], and such action shall not be deemed committed to unreviewable agency discretion. . . .

[12] Section 1681 states in full: "No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX's sections 1682 and 1683 are virtually identical to Title VI's sections 2000d-1 and 2000d-2. Section 1682 sets forth the administrative requirements for federal departments and agencies that grant financial assistance for education programs. Section 1683 provides judicial and administrative remedies in challenging department or agency action taken under section 1682.

[13] The section 2000d-2 and section 1683 remedies do not even apply to the central Title VI and Title IX provisions for

courts implied such a right in both statutes. *Cannon*, 441 U.S. at 696-703, 99 S.Ct. at 1957-61 (discussing history of Title VI implied private right of action); *id.* at 717, 99 S.Ct. at 1968 (implying private right of action in Title IX). Congress knew that Title VI

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prohibiting discrimination (sections 2000d and 1681). Section 505(a)(2) also appears incomplete, although in a different way, by providing only that victims of discrimination either by the recipients or the federal providers of federal financial assistance have the Title VI remedies. Section 505(a)(2) parallels the pre-1978 version of section 504's substantive prohibitions and does not include the language from section 504's contemporaneous amendment adding victims of discrimination by federal agency programs and activities to section 504's protection.

This incongruity between section 504's substance and section 505's remedy appears to have occurred because the conference committee adopted the House' section 504 amendment and the Senate's section 505 version without adding section 504's additional coverage to section 505's remedy provision. Congress intended, however, to extend section 504's reach to ensure that no one would be exempt from its nondiscrimination provisions. *See infra* section III.C. Section 505's remedy therefore must be available to victims of discrimination by federal agencies in their programs and activities brought within section 504's umbrella by the 1978 amendment. Section 505(b) in fact contemplates enforcement for all of the substantive rights in Title V (attorney's fees provision for "any action or proceeding to enforce or charge a violation of a provision of [Title V]"). The government in its brief appears to concede section 505's applicability to all section 504 violations.

Our analysis would not change, however, even if we did not conclude that section 505 must cover all violations of section 504. Congress was aware that section 504 provided an implied private right of action. Yet Congress did not eliminate this remedy but rather enforced it by adding section 505. We see no congressional intent to abolish the private right of action and every intent to reinforce it. As we explain later in our opinion, there is no evidence that Congress intended to distinguish between the remedy for the new element of section 504 and the remedy for other violations of the section.

provided an implied private right of action for discrimination victims when it amended section 504 and added section 505(a)(2)'s remedy provision. *See* 124 Cong.Rec. 30,349 (statement of Sen. Bayh).

Title VI and thus section 505(a)(2) provide two different paths for pursuing relief, depending on the claimant's status. Recipients of federal assistance may pursue judicial or administrative relief as provided in section 2000d-2 when challenging an agency's administrative or regulatory action as a funds administrator. Discrimination victims, however, have a private right of action in the courts against the private discriminator implied from the Act's substantive antidiscrimination provisions. The question before us is which remedy Congress intended for victims of federal agency discrimination.

B. *The Legal Standard for Ascertaining Whether the Government Has Waived Sovereign Immunity*

"The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769-70, 85 L.Ed. 1058 (1941) (citations omitted); *Arnsberg v. United States*, 757 F.2d 971, 977-78 (9th Cir.1985) (no right to money damages against United States without sovereign immunity waiver). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed" by Congress. *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.Ed.2d 52 (1969). Without such a waiver, the courts

have no jurisdiction to entertain a suit against the United States.[14]

The key to determining whether there has been a waiver is Congress's intent as manifested in the statute's language and legislative history. *See Block v. North Dakota*, 461 U.S. 273, 287-88, 103 S.Ct. 1811, 1819-20, 75 L.Ed.2d 840 (1983) (finding no congressional intent in statutory language and legislative history to exempt states suing federal government from statute of limitations included as a condition of sovereign immunity waiver); *King*, 395 U.S. at 5, 89 S.Ct. at 1503 (no indication in Declaratory Judgment Act or in its history that Congress intended the Act to expand Court of Claims's jurisdiction); *Sherwood*, 312 U.S. at 590, 61 S.Ct. at 771 (finding no congressional intent in Tucker Act's language or legislative history to consent to suits in district courts in addition to Court of Claims); *United States v. Washington*, 872 F.2d 874, 879 (9th Cir.1989) ("in divining Congressional intent" to waive sovereign immunity, "we look first to the statutory language and then to the legislative history if the statutory language is unclear" (internal quotations omitted)); *see also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S.Ct. 2615, 2622-23, 69 L.Ed.2d 435 (1981) (key to determining whether statute provides private right of action is congressional intent, determined by looking first to the statutory language and structure,

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[14] Although Doe has sued individuals only, he has sued the Attorney General of the United States and the Director of the Federal Bureau of Investigation in their official capacities. We construe his suit against them as a suit against the federal entities they represent. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir.1985).

then to legislative history "and other traditional aids of statutory interpretation").

Inquiring whether Congress intended to provide a private right of action against the United States and under what conditions is distinct from the similar task of determining whether a statute provides a general private right of enforcement. Congressional intent need not be "unequivocally expressed" for private rights of action against non-government defendants. The Supreme Court approved using four factors in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975), to decide whether Congress has implied a private right of action in a statute: whether the plaintiff falls within "the class for whose *especial* benefit the statute was enacted"; whether Congress indicated its intent, either explicitly or implicitly, to create or deny a remedy; whether the remedy is consistent with the statute's underlying purposes; and whether the cause of action traditionally is pursued in the state, rather than federal, forum. As the Third Circuit noted in *Patentas v. United States*, 687 F.2d 707, 711 (3d Cir.1982), however, *Cort* has not changed the focus for implying private rights of action against the United States. In this more narrow inquiry, the central, dispositive consideration is *Cort*'s second factor as modified to be consistent with traditional sovereign immunity analysis, *i.e.*, only explicit congressional intent in the statutory language and history will suffice.[15]

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[15] We note parenthetically that focusing on *Cort*'s second factor and determining legislative intent implicitly requires us to look at *Cort*'s other factors. For Congress to have intended to create a private right of action, it must necessarily have meant to enact the statute for the benefit of the plaintiff class, the right of action must be consistent with the statute's

The case law illustrates this distinction between inferring private rights of action generally and inferring them against the United States. A private right of action may be implied against a non-government defendant even though the statutory language grants no such right explicitly and the legislative history is silent on Congress's intent to provide it. *See Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 94, 101 S.Ct. 1571, 1582, 67 L.Ed.2d 750 (1981) (silent legislative history would not be fatal with some other indication of congressional intent); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 100 S.Ct. 242, 246, 62 L.Ed.2d 146 (1979) (intent need not be express but may "appear implicitly in the language or structure of the statute, or in the circumstances of enactment"); *Cannon*, 441 U.S. at 694, 99 S.Ct. at 1956 (when law grants specific rights to certain class, explicit purpose to deny remedy but not absence of explicit purpose to create one would be controlling); *Osborn v. American Ass'n of Retired Persons*, 660 F.2d 740, 745 (9th Cir.1981) ("congressional silence is not necessarily fatal to implication of a private right of action"). A silent statute and silent legislative history, however, cannot justify implying a private right of action against the United States because Congress must unequivocally express its intent to create such a right.

The case law demonstrates that the courts have consistently refused to imply private rights of action

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purposes and scheme, and the right of action certainly will be traditionally federal. *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 2488-89, 61 L.Ed.2d 82 (1979) (*Cort* second factor is the central inquiry, with the others traditionally relied upon in determining legislative intent).

against the United States or to ignore a condition on a sovereign immunity waiver when the statute and legislative history either were silent or indicated congressional intent not to grant the right requested. *See United States v. Mottaz*, 476 U.S. 834, 844-48, 106 S.Ct. 2224, 2230-33, 90 L.Ed.2d 841 (1986) (government waived its sovereign immunity in Quiet Title Act only with respect to one class of cases because United States not mentioned as a potential party with regard to other class); *Block*, 461 U.S. at 287-90, 103 S.Ct. at 1819-22 (Quiet Title Act and legislative history contained no indication that Congress intended to exempt states from condition on sovereign immunity waiver, a specific statute of limitations); *Lehman v. Nakshian*, 453 U.S. 156, 160-70, 101 S.Ct. 2698, 2701-06, 69 L.Ed.2d 548 (1981) (Age Discrimination in Employment Act's language, structure, and legislative history indicated Congress's intent that waiver of United States' sovereign immunity from suits under the Act was conditioned on alleged discrimination victim having no right to jury trial); *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (no indication either in Classification Act or its legislative history that plaintiffs were entitled to back pay for positions to which they should have been appointed); *Gaj v. United States Postal Serv.*, 800 F.2d 64 (3d Cir.1986) (Postal Reorganization Act is proscriptive with no focus on a benefited class, and neither statute's language or history shows congressional intent to create a private remedy); *California v. Walters*, 751 F.2d 977 (9th Cir.1984) (per curiam) (congressional intent to waive sovereign immunity only from suits for injunctive relief, not from criminal sanctions, in language and history of statute on hazardous waste disposal, 42 U.S.C. § 6961); *Patentas*, 687 F.2d at 710-13 (no explicit congressional intent in language or legislative

history of Ports and Waterways Safety Act of 1972 to waive immunity from private lawsuits against Coast Guard to require it to fulfill statutory responsibilities); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155-56 (9th Cir.1979) (neither express terms nor legislative history of 18 U.S.C. § 1162, jurisdictional statute for criminal offenses in Indian territory, revealed any congressional intent to waive Tribe's sovereign immunity). Section 504, however, contrasts starkly with these cases, for Congress unequivocally expressed its intent in the statute's language and history to provide handicapped victims of government discrimination a private right of action for damages against the government discriminator.

C. *Section 504's Language and Legislative History*

1. Statutory Language

a. *Section 504*

When Congress amended section 504 in 1978, it was aware, as we have discussed, that the courts had interpreted section 504 to provide a private right of action for discrimination victims. "The fact that a comprehensive reexamination and significant amendment" of the Rehabilitation Act left section 504 intact as it previously existed and under which the federal courts had implied a private right of action "is itself evidence that Congress affirmatively intended to preserve that remedy." *Merrill Lynch*, 456 U.S. at 381-82, 102 S.Ct. at 1841; *see also Cannon*, 441 U.S. at 698-99, 99 S.Ct. at 1958-59 (Congress's failure to negate private right of action implied in Title VI and Title IX provides "evidence that Congress at least acquiesces in, and apparently affirms," the right). Congress amended the statute to prohibit discrimination in "any program or activity conducted by any Executive agency or by the United States Postal

Service." Significantly, Congress did not make the amendment a new section; it did not even use a new sentence. Congress appended the new coverage to the end of the pre-existing sentence under which the private cause of action had been implied.

That Congress intended violations of the new clause to be enforced in the same way as violations of the pre-existing clause is a more reasonable conclusion than that Congress intended enforcement to be different. We infer likewise from the case law that this method of amendment signifies Congress's intent that the two clauses be enforced in the same way. In *Lehman*, 453 U.S. at 162-68, 101 S.Ct. at 2702-06, the Court looked at a similar type of situation under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Section 7(c) of the Act had authorized civil actions for age discrimination against private employers and expressly provided the right to a jury trial. In 1974, Congress amended the ADEA. It first expanded the Act's reach by adding state and local governments as potential defendants to section 7(c), subjecting them to the same enforcement procedures as private employers. Congress further broadened the Act by proscribing age discrimination in federal employment but did so in an entirely new section (section 15) with a distinct statutory scheme without expressly including the right to a jury trial. This difference in treatment led to the Court's conclusion that Congress intended that enforcement against federal defendants be distinct from enforcement against private employers and state and local governments. Specifically, persons suing federal defendants would not have the right to a jury trial.

Lehman makes clear that adding an entirely new statutory section to make federal defendants liable for discrimination indicates Congress's intent to

distinguish between enforcement for federal as opposed to other defendants. The converse is implicit; by simply adding federal liability to a pre-existing section 504, Congress intended that there be no distinction in its enforcement against federal defendants.

b. *Section 505(b)*

Doe points to section 505(b) as evidence that Congress must have intended that federal agencies be liable for damages for discriminating against the handicapped in their programs and activities. Section 505(b) states: "In any action or proceeding to enforce or charge a violation of a provision of [Title V], the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney's fee as part of the costs." (Emphasis added.) This section specifically contemplates the United States as a party in Rehabilitation Act lawsuits. Doe notes that the United States cannot be a plaintiff under the Act. For the United States to be a prevailing party, it must be a defendant. Congress must have intended, therefore, that federal agencies be subject to lawsuits for their discrimination against the handicapped. Otherwise, part of the attorney's fees provision would be meaningless.

In reaching this conclusion, however, Doe fails to consider section 501, under which the federal government is liable for handicap-based discrimination as an employer. Section 505(b) would not be meaningless even if federal entities could not be defendants under section 504 because employees would be entitled to attorney's fees against the government in successful section 501 proceedings.

Although Doe's specific argument on section 505(b)'s meaning fails, section 505(b) does indicate

congressional intent to treat all Rehabilitation Act Title V defendants the same except that the United States as a prevailing party is not entitled to attorney's fees. Section 501 makes the federal government liable for employment discrimination, section 504 makes agencies liable for discrimination in their activities other than employment, and section 505 makes the government liable for attorney's fees. There is no contrary indication that Congress intended to exclude the federal government from its reach. The statute's internal approach is to prohibit discrimination against the handicapped by anyone and to install a unitary enforcement mechanism.

The most reasonable interpretation from the language and structure of the statute is that Congress intended to make federal departments and agencies liable for discrimination against the handicapped in their programs and activities. Our reliance need not be solely on an interpretation of the language, however. The legislative history of the Rehabilitation Act buttresses this conclusion.

2. Legislative History

Although the House Reports and House Conference Report on the Rehabilitation Act amendments, reprinted in 1978 U.S.Code Cong. & Admin.News 7312, do not explain the motivation to amend section 504 or add the section 505 remedy provision, several members of Congress explained the reasons in the congressional debates. Remarks in the House focused on the need to make the discrimination prohibitions applicable to federal agencies, while in the Senate, members focused on ensuring the viability of private rights of action through an attorneys' fees provision.

In the House debates before initial passage of the bill, Representative Jeffords, an author of the bill, stated that the purpose of the section 504 amendment was "simply [to] extend[ ] the coverage of section 504 to include any function or activity of any department or agency of the Federal Government." He continued,

> When the original legislation was developed it was intended to apply to every phase of American life, but the Justice Department on September 23, 1977, issued an opinion at the request of HEW declaring that the Federal Government was exempt from the statute. This amendment removes that exemption and applies 504 to the Federal Government as well as State and local recipients of Federal dollars. The amendment requires each department and agency to promulgate regulations covering this new part. I think this is fair and appropriate and should go a long way toward developing a uniform and equitable national policy for eliminating discrimination.

124 Cong. Rec. 13,901. Representative Brademas explained, in debates over the bill after conference, that the bill "would require that Federal departments and agencies comply with the provisions of section 504." *Id.* at 38,549. Representative Jeffords reiterated,

> under section 504, . . . the conferees accepted a provision which I authored which I think brings fairness and equity to the entire picture in eliminating discrimination against the handicapped wherever it exists. In September 1977 the Justice Department issued an opinion at the request of the Department of Health, Education, and Welfare, declaring that the Federal Government was exempt from section 504. Somehow it did not seem right to me that the Federal

> Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves. So I developed a provision which is in this conference report that extends coverage of section 504 to include any function or activity in every department or agency of the Federal Government.

Id. at 38,551. Finally, Representative Sarasin added,

> [I]f laws are necessary and good, they should also apply to us. This legislation would extend the provisions of section 504 to each department, division, and agency of the Federal Government. No one should discriminate against an individual because he or she suffers from a handicap—not private employers, not State and local governments, and most certainly, not the Federal Government.

Id. at 38,552.

The Senate focused on the purpose of the attorneys' fees provision in section 505 in encouraging private enforcement of Title V. Section 505(b) states, "In any action or proceeding to enforce or charge a violation of a provision of [Title V], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Senate intended for this to parallel the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. 1988.[16]

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[16] "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Senator Cranston stated, in debates over the Senate version of the bill, "Such allowance of attorneys' fees would be an important step in assisting all handicapped individuals in their struggle by permitting equal access to the courts to enforce the provisions of Title V." 124 Cong.Rec. 30,346. He continued,

> [T]he rights extended to handicapped individuals under title V . . .—Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and nondiscrimination under Federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Private enforcement of these title V rights is an important necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect. As noted in the report to accompany S. 2278, the Civil Rights Attorneys' Fee Awards Act of 1976 (S.Rept. 94-1011):
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> > (A)ll . . . civil rights law depend [*sic*] heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate congressional policies which these laws contain.

The balance of Senator Cranston's remarks further reinforced the need to provide fees to the handicapped to ensure private enforcement. *Id.*; *see also id.* at 30,349 (statement of Sen. Cranston).

In the debate on the conference version of the bill, Senator Stafford reiterated the need for private enforcement. *Id.* at 37,507. After essentially

repeating what Senator Cranston had said a month earlier, he added,

> To date we have permitted certain private enforcement of title V and, yet, we have not provided the means by which such private rights of action are meaningful. This provision [on attorney's fees] will go a long way toward assisting handicapped individuals in their efforts to achieve their full and equal share of the rights to which they are entitled.

Two things are starkly clear from the congressional debates. First, Congress intended to put the federal government on equal footing with everyone else in making it subject to section 504's prohibition of discrimination against the handicapped. Second, Congress intended to encourage private parties to pursue enforcement of Title V, including section 504, through private rights of action. The debates consider a purpose of both section 504 and 505(b) to be the development of uniformity under Title V's provisions, giving all handicapped persons an equal chance at justice. The goal of uniform private enforcement cannot be accomplished by giving a right only to injunctive relief under the APA, the position advanced by the Justice Department, when the culprit is a federal agency. Although the debates do not state outright that section 504 subjects federal agencies to private actions for money damages, they nevertheless unequivocally express Congress's intent to do precisely that.

3. Case Law

a. *The distinction between agency as administrator and regulator and agency as proprietary discriminator.*

Only one case has specifically addressed the issue of a private right of action against the government under section 504, though apparently not for damages. *Cousins v. Secretary of United States Dep't of Transp.*, 880 F.2d 603 (1st Cir.1989). The Department of Transportation (DOT) had a regulation requiring a minimum level of hearing for truck drivers and would not grant waivers under this provision, although it did so for other physical qualifications. Cousins, a deaf truck driver with a state driver's license, sued DOT, claiming that the regulation and DOT's refusal to grant him a waiver violated section 504.

The First Circuit perceived the case as one involving a claim against a federal agency as *regulator*. The court found that section 504 "does not *expressly* provide a remedy for one harmed by a federal agency's regulatory action. . . . [T]he Act is silent about whether and how a person injured by the government *as regulator* is to enforce the Act against the government." *Id.* at 605 (emphasis added). The court held that Cousins had a right to relief under the Administrative Procedures Act. *Id.* at 607. The court stated, "Congress has not said or suggested, anywhere in the Rehabilitation Act or its legislative history, that the Act was meant to give rise to a right of action against the government as regulator, distinct from the general, background right to challenge regulatory action under the APA." *Id.*

Although the court did not appear to consider that a claim might derive from dealings with a federal agency acting in a capacity other than regulator, it

nevertheless confined its holding to regulatory action.[17] The court considered the effects of its decision to be jurisdictional only; under the APA, Cousins's appeal from DOT's ruling would be to the circuit court. Although the court did not mention the specific relief sought by Cousins, he apparently sued only for injunctive relief. The APA provides injunctive relief, not damages. The court did not mention that its holding would eliminate a damages claim.[18]

Doe's case is distinct from *Cousins*. The FBI acted in its proprietary capacity, not its administrative or regulatory capacities, when it demanded that Doe either deny that he had AIDS or that the hospital find someone else to do the FBI agents' physical examinations.[19] The Justice Department claims that Doe not

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[17] We accept on its face the First Circuit's characterization of the government's role as regulator in Cousins's case. We note, however, that we allowed a section 504 plaintiff seeking an injunction that would require a government defendant to issue regulations under section 504 to proceed in federal court, without government challenge. *Williams v. United States*, 704 F.2d 1162, 1162 (9th Cir.1983). The Seventh Circuit also found a Title VI violation in the Department of Housing and Urban Development's actions as a provider of financial assistance in *Gautreaux v. Romney*, 448 F.2d 731, 737-41 (7th Cir.1971).

[18] The dilemma in Cousins resulted from the incongruity between section 504's substantive laws and section 505's remedy provision. *See supra* p. 787 n. 13. Section 505 does not specifically address a situation like Cousins's or Doe's, where the discrimination does not occur in a financially-assisted private activity but in an activity operated by the federal government itself. The First Circuit nevertheless agreed that a cause of action existed against the government pursuant to section 504, but under the APA.

[19] The Seventh Circuit also distinguished between the discriminator and the administrator in *Salvador v. Bennett*, 800

only should be limited to injunctive relief, but that the relief should be available only under the Administrative Procedure Act. The FBI's action, however, is clearly not the kind of agency action that Congress designed the APA to address. The APA's purpose is to provide an administrative forum for those challenging administrative and regulatory agency action, not to provide a forum for adjudicating government tort liability. The Rehabilitation Act's legislative history, in any case, demonstrates Congress's intent not to limit victims of government discrimination to enforcement through injunctive relief under the APA but to permit enforcement through the same means available against private parties: enforcement in the courts with damages and equitable remedies.

b. *Title VI and Title IX parallel.*

As we have noted, Congress originally patterned section 504 after Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972[20] and assumed enforcement for each would be the same. *See Cannon*, 441 U.S. at 696, 99 S.Ct. at 1957 (Congress assumed Title IX would be interpreted and applied as Title VI had been); 124 Cong.Rec. 30,349 (statement of Sen. Bayh) (section 505 extends Title IX "remedies, procedures and rights" to section 504). No cases, however, have addressed whether a private

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F.2d 97, 99 (7th Cir.1986) (no private right of action against Secretary of Education for not investigating plaintiff's allegation more completely that university had violated section 504).

[20] The pattern was to provide that no person could "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," whether on the basis of handicap in section 504, sex in Title IX, or race in Title VI.

right of action against the federal government exists for money damages under Title VI or Title IX. This is understandable since those statutes, like pre-1978 section 504, focus on discrimination by federal financial assistance recipients, *i.e.*, by private entities. Claims against the government for directly discriminating against program participants would be unlikely since the government neither runs nor controls such programs.

Gautreaux v. Romney, 448 F.2d 731 (7th Cir.1971), is an exception. Black tenants and applicants for public housing in Chicago did sue the Secretary of Housing and Urban Development for declaratory and injunctive relief. The Department of Housing and Urban Development provided financial assistance for public housing in Chicago. The plaintiffs asserted, and the court agreed, that the Department had violated Title VI by knowingly acquiescing in the Chicago Housing Authority's discriminatory housing program.[21]

Fortunately, cases rarely appear in which the government is accused of such discriminatory behavior. *Gautreaux* reinforces our conclusion, however, that persons challenging the federal govern-

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[21] The district court had held that the doctrine of sovereign immunity applied to bar part of plaintiffs' suit. The defendant abandoned sovereign immunity, however, as a ground for affirmance on appeal. 448 F.2d at 733, 735. The plaintiffs had alleged a Fifth Amendment violation in addition to making their Title VI claim, and the opinion does not indicate whether defendant claimed sovereign immunity as to both or only one of these claims. The court does note that the doctrine would not protect the defendant because it "does not bar a suit such as this which is challenging alleged unconstitutional and unauthorized conduct by a federal officer." *Id.* at 735. Plaintiffs sued the Secretary, however, in his official, not individual capacity.

ment's own discriminatory activity in violations of the Title VI, Title IX, and section 504 antidiscrimination provisions should be able to present their claims in the courts of general jurisdiction.[22]

D. *Conclusion*

In amending section 504, Congress made certain that federal agencies would be liable for violations of the statute. Congress's insertion of federal agencies in the pre-existing clause subjecting others to liability and its broad-brush remedy provision indicate that Congress intended that there be no distinction among section 504 defendants. The congressional debates strongly reinforce this conclusion by stressing again and again that Congress's purpose in the section 504 amendment was to put the federal government on an equal footing with everyone else so that enforcement of the section would have no gaps. Congress stressed that this footing included a private right of action for damages. We conclude, therefore, that Doe does have a private right of action against the Justice Department and the FBI and remand to the district court for findings on the merits.

IV. QUALIFIED IMMUNITY

The district court granted Agent Held's motion for summary judgment, finding him to be entitled to

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[22] We can draw no conclusions from *Williams v. United States*, 704 F.2d 1162 (9th Cir.1983), as to whether section 504 provides a private right of action against the government for money damages. The plaintiffs in *Williams*, handicapped individuals and organizations dedicated to improving the quality of life for the handicapped, sought an injunction directing the United States Post Office to issue the regulations required by the 1978 amendment to section 504(a). The Post Office's challenge to the plaintiffs' standing failed. *Id.* at 1163. The defendant did not challenge the courts' jurisdiction to hear the case, and the opinion does not address it.

qualified immunity on both the Fifth Amendment privacy and the section 504 discrimination claims, because he "did all that was reasonable under the circumstances." The district court order stated,

> Evaluating the[ ] undisputed facts, the Court finds that everything Held did was reasonable. He had some duty to respond to the information that was presented to him and simply could not ignore it. He requested further investigation and imposed a requirement of confidentiality. He was confronted with a situation where the contract with the hospital was about to expire. In addition, he sought legal advice. He also sought advice from the plaintiff and the hospital, but got little cooperation. There is no genuine issue of material fact that Held did all that was reasonable under the circumstances and that he is entitled to qualified immunity.

Order re Motion by Defendant Held for Dismissal and, in the Alternative, for Summary Judgment at 3 (May 17, 1990). The relevant question for qualified immunity purposes, however, is not whether Agent Held's actions were "reasonable" in some practical sense, as the district court order suggests, but whether a reasonable official in Agent Held's position could have believed his actions were lawful in light of clearly established law.

Qualified immunity generally shields government officials performing discretionary functions "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reason-

ableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639, 107 S.Ct. at 3038 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738-39, 73 L.Ed.2d 396 (1982)). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039. The unlawfulness of the official action in question "must be apparent," *id.*; where there is a "legitimate question" as to the state of the law, it cannot be said that the official's action violates clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12, 105 S.Ct. 2806, 2820 n. 12, 86 L.Ed.2d 411 (1985).

A. *Fifth Amendment Privacy Claim*

Doe claims that the FBI and Agent Held violated his right to privacy by requesting that he reveal to them whether he had AIDS, and by discontinuing sending agents to him for physical examinations when he refused to disclose that information. The district court assumed for purposes of Held's motion for summary judgment that Doe had identified a constitutionally protected privacy interest. It nevertheless found that Held's actions were reasonable and thus protected by qualified immunity.

The constitution protects two kinds of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). At the time of the challenged actions, it was clear that medical information was encompassed within the first privacy interest related to disclosure of personal matters. *United States v. Westinghouse Elec. Corp.*, 638 F.2d

570, 577 (3rd Cir.1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."); *Caesar v. Mountanos*, 542 F.2d 1064, 1067 n. 9 (9th Cir.1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 804 (1977) (right to privacy encompasses doctor-patient relationship).

While the Ninth Circuit had not ruled on the issue, it likewise should have been plain to a reasonable government official that information regarding an individual's HIV-status or AIDS diagnosis would fall within the ambit of the privacy protection afforded medical information. *See Woods v. White*, 689 F.Supp. 874, 875 (W.D.Wis.1988), *aff'd* 899 F.2d 17 (7th Cir.1990) ("it would have been clear to a competent public official in 1986 that individuals had a constitutional right to privacy in information relating to AIDS"); *Glover v. Eastern Neb. Com. Office of Retardation*, 686 F.Supp. 243, 250 (D.Neb.1988), *aff'd* 867 F.2d 461 (8th Cir.1989) (individuals have a reasonable expectation of privacy in the personal information their body fluids contain). Certainly it was known by 1988 that an AIDS diagnosis was extremely sensitive medical information. *See Chalk v. United States Dist. Court*, 840 F.2d 701, 711 (9th Cir.1988); *Ray v. School Dist. of DeSoto County*, 666 F.Supp. 1524, 1535 (M.D.Fla.1987).

It was also clear in 1988, however, that the privacy protection afforded medical information is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest. *United States v. Westinghouse*, 638 F.2d at 578 (citing illustrations from *Whalen v. Roe*, 429 U.S. at 602 n. 29, 97 S.Ct. at 878 n. 29, of governmental intrusions held to outweigh individual privacy

interests in medical information, including statutory reporting requirements relating to venereal disease, child abuse, injuries caused by deadly weapons and certification of fetal death); *Caesar v. Mountanos*, 542 F.2d at 1068 (doctor-patient and therapist-client privacy rights conditional rather than absolute and limited impairment may be allowed if properly justified). To decide if the government may seek or use private information, courts balance the government's interest in having or using the information against the individual's interest in denying access. *United States v. Westinghouse*, 638 F.2d at 577-78. The government may seek and use information covered by the right to privacy if it can show that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest. *Thorne v. City of El Segundo*, 726 F.2d 459, 469-71 (9th Cir.1983), *cert. denied*, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984). The more sensitive the information, the stronger the state's interest must be. *Id.* at 469.

Doe concedes that the FBI has a legitimate interest in protecting the health of its agents. He argues, however, that this interest was in no way implicated because his condition presented no risk to his patients. Were we to reach the underlying question of whether Dr. Doe's privacy rights were violated, we would be required to "engage in the delicate task of weighing competing interests." *United States v. Westinghouse*, 638 F.2d at 578.

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified [include] the type of [information] requested, . . . the potential for harm in any subsequent nonconsensual disclosure, . . . the

> adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. The balancing task would be rendered even more difficult in this case since evaluating factors such as "the degree of need for access" would require us to consider matters on the forefront of medical technology, in an area which is in a considerable state of flux.[23]

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[23] Even within the constellation of issues related to AIDS, all of which are relatively new and developing, the question of transmissibility from health care providers to patients is particularly unexplored, and views on the issue have been shifting in the past year following the discovery that a Florida dentist probably infected several of his patients. The American Medical Association and American Dental Association have recently reversed longstanding policy and declared that health-care workers infected with HIV, the virus that causes AIDS should disclose their infection to their patients before performing invasive procedures. Schulman, *Stigma, Risk and the Florida AIDS Dental Cases*, L.A. Times, June 2, 1991, at 2, col. 1. However, many other profession groups, including the New York State Department of Health and the California Medical Association object to the change in policy based on transmission by a single practitioner. *Id.*

At the time of the challenged actions, the Center for Disease Control Guidelines noted that "[a]lthough transmission of HIV from infected health-care workers to patients has not been reported, transmission during invasive procedures remains a possibility." Center for Disease Control, *Recommendation for Prevention of HIV Transmission in Health-Care Settings*, Morbidity & Mortality Weekly Report Supplement, Aug. 21, 1987, at 5-6 [hereinafter CDC Guidelines]. *See also Estate of Behringer v. Medical Center at Princeton*, 249 N.J.Super. 597, 592 A.2d 1251 (Law Div.1991) (finding substantially justified a hospital's policy requiring HIV-infected surgeon who performed invasive procedures on mucous

However, we need not undertake fully the difficult balancing between Doe's right to confidentiality of his AIDS diagnosis and the FBI's interest in limited disclosure. Our inquiry in this case is limited to whether it was objectively reasonable for Agent Held to believe in 1988 that Doe's privacy interest was outweighed by the potential for danger to his agents. We note that Agent Held was aware that the physical examinations involved arguably invasive procedures (such as pelvic examinations and pap smears), that he sought only limited disclosure to the relevant FBI decisionmakers, and that he intended to take steps to safeguard the confidentiality of the information. Under those circumstances, we find that a "legitimate question" existed as to whether Held's conduct violated Doe's privacy rights. We therefore affirm the district court's holding that Agent Held was entitled to qualified immunity on Doe's privacy claim.

B. *Section 504 Claim*

A person claiming discrimination under section 504 must show first that she is handicapped and second that she is "otherwise qualified" for the job.[24] *See School Bd. v. Arline*, 480 U.S. 273, 280-89, 107 S.Ct.

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membranes to obtain informed consent of his patients or not perform surgery and noting that "[w]hile the debate will rage long into the future as to the quantifiable risk of HIV transmission from doctor to patient, there is little disagreement that a risk of transmission, however, small, does exist. . . . In quantifying the risk, one must consider not only statistical data, but the nature of the procedure being performed.")

[24] Doe has alleged discrimination against a federal agency that was not his employer. Any unlawful discrimination that may have occurred, however, was based on the FBI's conclusion that Doe's handicap prevented him from doing his job satisfactorily. We therefore must consider whether Doe was otherwise qualified to do that job, i.e., routine physical examinations.

1123, 1127-32, 94 L.Ed.2d 307 (1987); 29 U.S.C. § 794(a).[25] Under *Anderson v. Creighton*, 483 U.S. at 640, 107 S.Ct. at 3039, Agent Held is entitled to qualified immunity only if the "contours" of Doe's rights against discrimination were not sufficiently clear in light of pre-existing law so "that a reasonable official would understand that what he is doing violates that right."

An objectively reasonable agent should have understood that Doe was handicapped. In *Arline*, the Supreme Court held that persons with contagious diseases may be handicapped for purposes of section 504. *Id.* at 280-86, 107 S.Ct. at 1127-30. Subsequent to *Arline*, our circuit recognized that persons with AIDS ("PWAs") have such a handicap. *Chalk v. United States Dist. Court.*, 840 F.2d at 704-05. At the time Held ceased sending FBI recruits and agents to Doe and the clinic for physicals, the law was clear that persons with AIDS were handicapped within the meaning of the first element of section 504.

A person meets the second requirement, that she be otherwise qualified for a job, if she is able to perform "the essential functions of the job." *Arline*, 480 U.S. at 287 n. 17, 107 S.Ct. at 1131 n. 17; 29 C.F.R. § 32.3; 45 C.F.R. § 84.3(k)(1). Under *Arline*, a person may not be otherwise qualified for a job if, in performing the job, she "expos[es] others to significant health and safety risks." 480 U.S. at 287, 107 S.Ct. at 1131. Specifically, a person who poses "a significant risk of communicating an infectious disease to others in the workplace is not otherwise qualified if reasonable

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[25] A handicapped person not otherwise qualified still receives section 504 protection from discrimination if a reasonable accommodation by the discriminator will enable the employee to perform the job functions. *Id.* at 287 n. 17, 107 S.Ct. at 1131 n. 17.

accommodation will not eliminate that risk." *Id.* at n. 16. According to the Supreme Court, resolution of the otherwise-qualified question in most cases will require individualized inquiry and appropriate factfindings. *Id.* at 287, 107 S.Ct. at 1131. "Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear. . . ." *Id.* The inquiry should include

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 288, 107 S.Ct. at 1131 (quoting *Amicus Curiae* Brief of the American Medical Association at 19).[25] "In making these findings [of fact]," the Court held, "courts should normally defer to the reasonable medical judgments of public health officials." *Id.*

As with the privacy claim, resolution of the ultimate question of whether Doe was "otherwise qualified" will require careful consideration of a complex issue in an area of medicine which is in considerable flux: Whether Doe, given the specific nature and manifestation of his AIDS, the type of procedures he was performing, the precautions he followed, and the facility's monitoring of those

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[25] In *Chalk*, 840 F.2d at 704-08, our circuit applied precisely this framework in reviewing and reversing a district court's denial of a preliminary injunction reinstating a teacher with AIDS who had been removed from the classroom.

precautions, posed significant (if any) risk to patients. Once again, however, the ultimate question was not resolved by the district court, and is not before us at this juncture. We are presented only with the question of whether a reasonable official in Agent Held's position would have understood that his actions violated clearly established law.

Under *Arline* and *Chalk*, a reasonable official would have known that he could not discriminate against a PWA if the PWA were otherwise qualified to perform her job. The official would also have known that determining whether the PWA was otherwise qualified would require a reasoned medical judgment about the risk of contagion and the conditions under which contagion would occur, including the precautions under which contagion would not occur. Dr. Doe argues that Agent Held is not entitled to qualified immunity because he undertook no inquiry of a medical nature. Rather, he consulted only with nonmedical personnel—the FBI's Assistant Director of Administrative Services and the FBI's counsel. Doe and the hospital offered the only medical opinions that Held received; they asserted that Doe posed no risk to FBI patients because he conformed his conduct to the CDC Guidelines.

Agent Held asserts that his efforts to make a reasonable investigation were stymied by Doe's refusal to provide information regarding whether he had AIDS and by the need to maintain confidentiality.[27] Arguably, Agent Held should simply

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[27] We find the latter argument regarding confidentiality unpersuasive. A confidential telephone call to the CDC, Surgeon General or other public health official, in which Dr. Doe's identity need not have been disclosed, could have yielded

have assumed that Dr. Doe had AIDS and proceeded to gather information from health officials on that basis. That presupposes, however, that AIDS manifests itself in the same manner in all PWAs, and that the risk of transmission is the same in all cases and under all conditions. As a medical matter, that is not accurate; as a legal matter, reliance on such presumptions conflicts with *Arline*'s and *Chalk*'s mandate that an individualized inquiry be undertaken.[28]

It is true that Agent Held never asked Dr. Doe more specific questions about the nature of his symptoms, if any, and that Doe might have been willing to provide answers to such questions even though he refused to answer the initial inquiry regarding whether he had AIDS. Undoubtedly the better course would have been for Agent Held to have approached medical professionals to obtain information about the transmissibility of AIDS, and then to have reapproached Dr. Doe with more specific and relevant questions regarding his condition, his adherence to the CDC precautions, and any provisions by the facility for monitoring such adherence. Likewise, it would have been better for Dr. Doe, a medical professional, candidly to have provided

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substantial information to assist Agent Held in his decision-making, without any risk of a breach of confidentiality.

[28] For example, at the time of the challenged actions, the CDC Guidelines recommended that "[h]ealth-care workers who have exudative lesions or weeping dermatitis should refrain from all direct patient care . . . until the condition resolves," CDC Guidelines at 6, indicating that health care workers with such conditions pose a different risk of transmission than those without. Had Held presumed the worst scenario in order to make his risk assessment, i.e., that Doe had exudative lesions, Doe might well have complained of the lack of an individualized inquiry into his condition and how it affected his qualifications to perform the examinations.

information about his exact medical condition, his adherence to CDC guidelines, and the facility's monitoring of his compliance with those guidelines. We cannot say that at the time Agent Held took the challenged actions in 1988, he reasonably should have known that terminating the physical examinations unless Dr. Doe responded to the FBI's inquiry regarding his AIDS status was a violation of Dr. Doe's clearly established rights under section 504.[29] Accordingly, we affirm the district court's holding that Agent Held was entitled to qualified immunity on Dr. Doe's section 504 claim.

CONCLUSION

We find the claims for injunctive relief moot and vacate the district court's opinion with respect to them. The district court and this court, rather than the Court of Claims, have jurisdiction over the damage claims. We hold that Congress waived sovereign immunity and provided a private right of action for damages for discrimination claims against the United States under section 504 of the Rehabilitation Act. We reverse the district court's contrary judgment and remand for findings on the merits. Finally, we affirm the district court's summary

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[29] We do not hold that Held's actions were not a violation of section 504. We make no determination as to whether Dr. Doe was otherwise qualified to perform routine physical examinations. We also make no determination as to whether the FBI discriminated against Dr. Doe because he had AIDS, or whether the FBI discriminated against Dr. Doe because he refused to disclose information necessary to determine if he was "otherwise qualified" for his job. We hold only that a reasonable official could have believed Agent Held's actions to be lawful since there was a "legitimate question" as to whether they violated Doe's rights under section 504.

judgment in favor of Agent Held on the ground of qualified immunity.

VACATED in part, REVERSED in part, AFFIRMED in part, and REMANDED.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-88-3820-CAL

JOHN DOE, PLAINTIFF

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

[Filed Aug. 25, 1989]

OPINION

LEGGE, District Judge.

This case was tried to the court, sitting without a jury, and was submitted to the court for decision. The court has heard and reviewed the testimony of the witnesses, and has reviewed the exhibits admitted into evidence, the record of the case, the briefs filed by the parties, the arguments of counsel, and the applicable authorities. This opinion constitutes the court's findings of fact and conclusions of law, as required by Rule 52 of the Federal Rules of Civil Procedure.

I.

The complaint asserts two claims. The first is under 29 U.S.C. § 794, a part of the Rehabilitation Act. The cases interpreting 29 U.S.C. § 794 generally refer to it by its public law section number, section 504; for purposes of consistency so will this opinion.

Plaintiff also alleges that the defendants' use of private information about him was a violation of his privacy rights under the due process clause of the Fifth Amendment to the United States Constitution. Plaintiff dismissed his claim for damages under the constitutional claim, so the only relief requested under that count is equitable relief.

This court has jurisdiction over the action by virtue of 28 U.S.C. § 1331 and § 1391(b).

II.

Plaintiff is a medical doctor. He is engaged in the private practice of medicine as a doctor employed by, and the director of, a health care facility. The health care facility is controlled by a hospital.[1] Plaintiff receives a salary from the facility, and his earnings are in part based upon the earnings of the facility from the patients whom plaintiff treats.

From approximately December 1984 to August 1988, defendants sent all persons who were applicants for employment by the Federal Bureau of Investigation to the facility for pre-employment physical examinations, and they sent all employees of the Bureau to the facility for annual and promotion

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[1] For reasons of privacy, plaintiff is referred to as "Dr. Doe," the health care facility is called "the facility," and the hospital is called "the hospital."

physical examinations. Defendants paid the facility a fee for each of the examinations. Virtually all of those physical examinations were conducted by plaintiff.

Plaintiff has contracted acquired immune deficiency syndrome ("AIDS"). On or about August 15, 1988, someone advised the Bureau that plaintiff had Kaposi's Sarcoma, an AIDS-related illness. Defendants attempted to verify the information and the risks which might exist from plaintiff's performing the physical examinations of the Bureau's employees and applicants. Plaintiff, the facility, and the hospital did not directly confirm to defendants that plaintiff had AIDS. They instead informed defendants that there was no medical risk from Dr. Doe's performing the physicals, and they offered education on the appropriate medical standards. Defendants did not consider the responses of plaintiff, the facility, or the hospital to be adequate. On or about August 23, 1988, defendants ceased sending employees and applicants to the facility for physical examinations because of defendants' concern about plaintiff's illness.

Defendants did not resume sending employees and applicants to the facility until after this court issued a preliminary injunction. Thereafter, defendants authorized three health care organizations, one of which is the facility, to do the physical examinations of the Bureau's employees and applicants. Since defendants began using that procedure, the facility has received fewer patients for physical examinations than it did prior to August 15, 1988.

III.

The threshold issue is whether plaintiff has a private right of action in a United States District

Court against these federal defendants under section 504. The section provides in pertinent part as follows:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

It is settled in this circuit that AIDS is a "handicap" under section 504. *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir.1988); *Thomas v. Atascadero*, 662 F.Supp. 376 (C.D.Cal.1987). For purposes of this analysis, the court will also assume that plaintiff is an "otherwise qualified individual" within the meaning of section 504.[2]

More precisely, the question is whether such a plaintiff has a private right of action under section 504 in this court against a government agency and its officials who purchase services from plaintiff's employer.[3]

Neither the statute nor the legislative history answer the question. And in spite of an extensive volume of litigation under section 504 and related sections, no case directly answers the question.

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[2] The issue of "otherwise qualified" was the subject of extensive evidence at trial, and factual findings on that issue would be necessary if there is a private right of action.

[3] The evidence is clear that plaintiff suffered a direct loss of income from defendants' reduced use of the facility.

The United States Supreme Court and the courts of this circuit recognize a private right of action under section 504 against the entity which is the recipient of federal funds. *School Board v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984); *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir.1988); *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103 (9th Cir.1987); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir.1980); *Thomas v. Atascadero*, 662 F.Supp. 376 (C.D.Cal.1987). But those cases do not answer the question of whether there is a cause of action against the federal agency which provides the funds. In the present case, it is not the recipient of the funds which allegedly discriminated against plaintiff, but the federal agency itself.

A private right of action exists against a government agency by an *employee* of the agency, or an applicant for employment by the agency. *Johnston v. Horne*, 875 F.2d 1415 (9th Cir.1989); *Boyd v. U.S. Postal Service*, 752 F.2d 410 (9th Cir.1985); *Sisson v. Helms*, 751 F.2d 991 (9th Cir.), *cert. denied*, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.2d 113 (1985). However, plaintiff here is not an employee of the federal agency. Nor does plaintiff claim that his status as an employee of the facility makes him an employee of the agency. And the right of an employee to sue a federal agency has most recently been limited to section 501, rather than section 504, of the Rehabilitation Act. *Johnston v. Horne*, 875 F.2d 1415, at 1420.

The Ninth Circuit in *Williams v. United States*, 704 F.2d 1162 (9th Cir.1983), reversed the grant of an injunction against a federal agency under section 504, but not on the issue of a private right of action; at 1163-4. The court said that the plaintiff classes and

organizations had standing to assert their claims. It did not address the issue of a private right of action, and the suit was to compel the agency to issue regulations and was not one for damages.

Several cases have prohibited suits against federal agencies under the statute, albeit in situations not directly controlling the present case. In *Marlow v. U.S. Department of Education*, 820 F.2d 581 (2nd Cir.1987), *cert. denied*, 484 U.S. 1044, 108 S.Ct. 780, 98 L.Ed.2d 866 (1988), a teacher was denied a cause of action against the Department of Education on review of an administrative finding. In *Salvadore v. Bennett*, 800 F.2d 97 (7th Cir.1986), a student was denied a cause of action against the Department of Education, but the decision turned on an analysis of Title VI and Title VII procedures. In *NAACP v. Medical Center*, 599 F.2d 1247 (3rd Cir.1979), a plaintiff class sued a medical center and government officials alleging that a planned relocation of the medical facility violated section 601 of Title VI and section 504 of the Rehabilitation Act. The Third Circuit held that plaintiffs had a private right of action against the medical center, as a recipient of federal funds, but did not have a private right of action against the federal agency itself. *Id.* at 1254-55 and n. 27 and 1258-59 and n. 49. In *Community Brotherhood of Lynn, Inc. v. Lynn Redevelopment Authority*, 523 F.Supp. 779 (D.Mass.1981), a cause of action based on Title VI was not permitted against federal defendants (at 780). Those cases involve some points of distinction with the present case. For example, Title VI cases are not directly controlling because of certain differences in the statutory provisions. However, the legislative history indicates that section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 in Title

VI. S.Rep. No. 93-1297, 93rd Cong., 2d Sess. 39-40, reprinted in 4 U.S.Code Cong. & Admin.News, pp. 6373, 6390 (1974). In addition, section 504 incorporates Title VI procedures as permissible remedies. The above cases as a whole do indicate a reluctance to permit private rights of action against federal agencies unless the congressional intention to do so is clear.

The most recent case is *Cousins v. Secretary of Transportation*, 880 F.2d 603 (1st Cir.1989). Initially, a panel of the First Circuit recognized a right of action against a government agency under section 504 with respect to its adoption of regulations. *Cousins v. Secretary of U.S. Department of Transportation*, 857 F.2d 37, 42-45 (1st Cir.1988). However, that decision was withdrawn, and after an *en banc* hearing the First Circuit affirmed the District Court's dismissal of the section 504 suit. 880 F.2d at 612. The court held that plaintiff's remedy is under the Administrative Procedures Act:

> ... nor is there any indication that it is meant to imply that plaintiff can sue federal agencies directly under § 504, rather than within the confines of the APA.

Id. at 607.

In sum, no case has held that a section 504 cause of action can be maintained against a federal agency by an employee of a supplier. And the cases brought against federal agencies cited above, interpreting at least analogous provisions, have ruled against such a cause of action.

The agency's regulations must also be considered. Section 504 required the promulgation of regulations, and required that the regulations be submitted to

Congress and not take affect earlier than thirty days after they were submitted. The Department of Justice did so, and those regulations are now contained in 28 Code of Federal Regulations.

Part 41 of those regulations implements section 504 in so far as it applies to "any program or activity receiving Federal financial assistance." Section 41.3(e) defines "Federal financial assistance," and expressly states that it does *not* include procurement contracts. This definition states the agency's intent to preclude the application of section 504 to such a relationship as the one here between the agency and the facility which employs plaintiff.

Part 39 of the regulations enforces the portion of section 504 pertaining to "any program or activity conducted by" the federal agency. Section 39.130 of the regulations appears to prohibit the handicap discrimination which is alleged in this case; *see* 39.130(b)(3) and (b)(5). The latter section is particularly important, because it expressly applies to procurement contracts:

> The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

However, Part 39 does not provide for a civil right of action against the agency. The compliance procedures are set forth in section 39.170, and they are administrative remedies before the agency. Subsection (a) says that "this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency."

The editorial notes to this section of the regulations make it clear that the intent of the

regulations is to provide for an *administrative* remedy, and not for a private right of action in court:

> "Section 39.170 establishes a detailed complaint processing and review procedure for resolving allegations of discrimination in violation of section 504 in the Department of Justice's programs and activities. *The 1978 amendments to section 504 failed to provide a specific statutory remedy for violations of section 504 and federally conducted programs.* The amendment's legislative history suggesting parallelism between section 504 for federally conducted and federally assisted programs is unhelpful in this area because the fund determination mechanism used in section 504 federally assisted regulations depends on the legal relationship between a Federal funding agency and the recipients to which the Federal funding is extended. The Department has decided that the most effective and appropriate *manner in which to enforce section 504 in the federally conducted area is through an equitable complaint resolution process.* Section 39.170 establishes this process."

28 C.F.R. § 39.170 Editorial Note at 402 (1988) (emphasis added).

It is thus clear from the regulations, which were submitted to Congress before they became effective, that section 504 does not give plaintiff a private right of action against the agency under "any program or activity receiving Federal financial assistance," because they do not include procurement arrangements. And plaintiff's remedy for a section 504

violation under "any program or activity conducted by" the agency is limited to administrative remedies.[4]

The court therefore concludes that plaintiff does not have a private right of action against these defendants under section 504, and he must pursue his administrative remedies before the Department of Justice.[5]

IV.

Plaintiff's second claim is an alleged violation of his right of privacy under the due process clause of the Fifth Amendment to the Constitution. Plaintiff's claim in this regard is twofold: that defendants disclosed plaintiff's medical information to others, and that defendants used the medical information in the decisions which they made. Plaintiff seeks only injunctive relief on this claim.

The court finds and concludes that defendants did not violate plaintiff's right to privacy. Defendants' actions were in the exercise of their legitimate governmental responsibilities, and were reasonable under the circumstances with the information known to them at that time.

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[4] The court recognizes that at the time of granting plaintiff a preliminary injunction it did not believe that plaintiff was limited to his administrative remedies. However, after now having the opportunity to review the statutory, regulatory, and case history in detail, the court believes that its conclusion on the motion for preliminary injunction was incorrect.

[5] For purposes of the period of limitations defined in 28 C.F.R. 39.170(d)(3), the court deems the complaint to have been filed on the date the complaint in this action was served on defendants.

Because defendants compel their employees and applicants to get physical examinations, and directed all of those employees and applicants to the facility, defendants had a duty to be concerned for the health of their employees and applicants. Even though defendants' concerns may have been dispelled by better medical information, defendants' steps at the time were reasonable ones, in supposed protection of their employees and applicants and of their own potential liability. This was particularly true since neither plaintiff, the facility, nor the hospital made full disclosures to defendants about the nature and extent of plaintiff's disability, but instead simply assured defendants that there was no medical risk and offered further general education.

When defendants learned the information about plaintiff, they were concerned about plaintiff's privacy interests and took affirmative steps to assure his privacy, even at the risk of incurring the later displeasure of their employees. Defendants first discussed their information with the clinical director of the facility. That was an appropriate step, because the clinical director was defendants' contact with the facility. Further discussions within the facility and the hospital were initiated by the clinical director and by plaintiff. Defendants made no other disclosures of the information about plaintiff, other than to those within the Bureau and the Department of Justice who were involved in the decision making process (that is, had a "need to know"). Defendants also sought legal and medical advice within the Department of Justice. The matter first received public attention when this lawsuit was filed, and the public press printed stories about it.

While defendants' concerns about the risk to their applicants and employees may now be medically

unfounded, defendants had the obligation to obtain additional information and take appropriate steps based upon the information which was known to them at that time. The use of the information about plaintiff, and the limited disclosures that were made by defendants, were legitimate exercises of governmental responsibilities which outweigh plaintiff's interest in the privacy of the information. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 313-17, 99 S.Ct. 1123, 1129-32, 59 L.Ed.2d 333 (1979); *United States v. Westinghouse Electric Corporation*, 638 F.2d 570, 578 (3rd Cir.1980).

The court therefore concludes that plaintiff has not demonstrated an invasion of plaintiff's constitutionally protected privacy interests.

V.

IT IS THEREFORE ORDERED that judgment be entered in favor of defendants and against plaintiff.

Supreme Court, U.S.
FILED
DEC 29 1995
OFFICE OF THE CLERK

No. 95-830

In The Supreme Court of the United States

October Term, 1995

Attorney General of the United States of America, *et al.*,
Petitioners,

v.

John Doe, M.D., By Curtis Lavery, Executor of His Estate,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action under section 504 of the Rehabilitation Act of 1973 was brought against the FBI (petitioner) by Dr. John Doe (respondent [1]), a medical doctor.

Until August, 1988, Dr. Doe performed routine annual physical examinations on FBI agents and pre-employment physicals on applicants. Dr. Doe was the only doctor the FBI used for physicals, and it had been using him for four years. Petition for Certiorari (Pet.), App. A, p. 2a; App. D, p. 67a. The FBI learned in August of 1988

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[1] Although the respondent here is actually the estate of Dr. John Doe, this Brief in Opposition refers to Dr. Doe as "respondent" for clarity and simplicity.

that Dr. Doe had AIDS from an "unnamed source." The FBI asked Dr. Doe and the hospital at which he worked if he had AIDS. Dr. Doe and the hospital refused to say; they did say that since Dr. Doe was following accepted, federally recommended infection control procedures, there was no significant risk to the agents. Pet. App. A, p. 2a.

As the District Court later found based on unanimous expert testimony, Dr. Doe and the hospital were correct. But as the Court of Appeals noted, the FBI showed little concern about infection control, and was, rather, simply interested in whether or not Dr. Doe had AIDS. Since Dr. Doe would not answer that question, the FBI stopped using him. He then brought this action, and moved for a temporary restraining order and a preliminary injunction. Pet. App. A, pp. 3a, 7a; App. C, pp. 24a-25a; App. D, p. 67a.

The District Court denied both on the basis that Dr. Doe could not sue the federal government under section 504 because he was not a federal employee. See Hearing on Motion for Temporary Restraining Order, October 5, 1988 (Dist. Crt. Docket No. 33). After Dr. Doe moved for reconsideration, the District Court reversed that ruling. However, the District Court issued an injunction which allowed the FBI to contract with additional physicians to provide physicals, and to leave the choice of a physician to the agent. Dr. Doe's business fell off drastically, from 30-40 physicals per month to about five. Pet. App. C, pp. 24a-25a.

The case was tried from May 9 through May 17, 1989. On August 25, the District Court gave judgment for petitioners, holding that the federal government was not subject to suit under section 504 of the Rehabilitation Act, because it created no "cause of action" against the United States. See Pet. App. D, pp. 68a-77a.

Dr. Doe appealed. A few days after the decision, Dr. Doe's illness forced him to stop work. In the Court of Appeals, the government argued that Dr. Doe's incapac-

ity rendered his claim for equitable relief moot, and that the United States had not waived its sovereign immunity from claims for damages under section 504. Pet. App. C, pp. 26a, 30a. In a decision handed down August 1, 1991, the Court of Appeals agreed that the claim for equitable relief was moot, but held that the language and history of the statute made it clear that Congress had intended to waive sovereign immunity from damage claims. (The Court of Appeals also upheld a District Court ruling granting summary judgment to the head of the San Francisco office of the FBI on the basis of qualified immunity, and dismissing Dr. Doe's fifth amendment claim for invasion of privacy). Pet. App. C, pp. 26a-65a.

On remand, the District Court again ordered judgment for petitioners. The court found that the petitioners stopped using Dr. Doe because he would not say if he had AIDS, and because he did not provide the FBI with other information about risks and precautions. The failure to provide risk and precaution information, said the court, prevented petitioners from deciding if Dr. Doe was qualified, (which he must have been to be able to invoke the protections of the Rehabilitation Act). The court also ruled that Dr. Doe's failure to say if he had AIDS prevented petitioners from taking steps to "protect patients," which it impliedly held they had a right to do even though it found he posed no significant risk when he performed physicals. Pet. App. B, pp. 20a-21a.

The Court of Appeals reversed, holding: 1) that it was the FBI's obligation to discover the scientific facts about risk, not Dr. Doe's; 2) that the record established beyond any doubt that the FBI was not interested in information about risk, and that Dr. Doe was "entirely forthcoming" on the issue; and 3) that the "significant risk" standard announced by this Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) applies in the health care setting, and that, accordingly, an employer is not entitled to know if a health care employee has a disability unless the condition could pose a "signifi-

cant risk;" since the District Court found there was no significant risk here, the Court of Appeals held Dr. Doe had no obligation to say if he had AIDS. Pet. App. A, pp. 2a-9a.

After obtaining one extension of time, the government filed this petition for certiorari, raising only the question of whether the Court of Appeals' 1991 decision on sovereign immunity under the Rehabilitation Act was correct.

SUMMARY OF ARGUMENT

This Court should not grant certiorari in this case. While the government and respondent agree that the sovereign immunity question it poses is important, they also agree that This Court should address the issue in a different case, *Lane v. Pena*, No. 95-365. It would be inappropriate for This Court to exercise its discretion to "hold" the government's petition in this case pending the outcome in *Lane* because the process by which the respondent was effectively denied any substantial equitable relief, and which has kept this case alive for so many years, deprives the government of any call on This Court's equitable powers.

REASONS FOR DENYING THE WRIT

Respondent agrees with the government that the question of whether the United States has waived its sovereign immunity from damages under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) is important. Respondent also agrees that This Court should resolve that issue not in this case but in *Lane v. Pena*, No. 95-365.

What the government is asking This Court to do in this case is not to grant certiorari to resolve an important question, but to use its certiorari jurisdiction to "hold" the case pending the outcome in *Lane* in order to shield it from a modest damages exposure in this case, should

This Court decide that the United States has not waived sovereign immunity.[2]

The decision about whether to grant certiorari is discretionary. See, Supreme Court Rule 10; see also, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955). It follows that the decision to "hold" a petition for certiorari pending disposition of another case must be discretionary as well. For two reasons, This Court should decline to use its discretionary power to "hold" the certiorari petition in this case, and should allow this prolonged litigation to end at last. First, respondent was effectively prevented from obtaining meaningful equitable relief on the basis of legal arguments so untenable that they have never even been presented to the Court of Appeals, on either of the two occasions when this case was before that court. Second, this case has been kept active over seven years with a combination of legal and factual arguments which are concededly insupportable.

When the FBI stopped using respondent for physical exams, it was relatively candid about the fact that it did so because he would not say if he had AIDS. The FBI wanted to know so that if he did have AIDS, it could tell its agents, provide a second doctor as an alternate, and let the agents decide if they wished to see respondent. See Pet. App. B, pp. 13a-15a.

When Dr. Doe sought preliminary relief, the government argued (successfully) not that it had a legal right to know if he had AIDS, but rather that only federal employees may sue the United States under section 504. The District Court refused any relief. After respondent showed the court on a motion for reconsideration that under binding Ninth Circuit authority, federal employees alone are *prohibited* from suing the United States under

[2] At trial, respondent proved out of pocket losses of approximately $28,000, and asked for emotional distress damages in a similar amount.

the Rehabilitation Act, the government dropped that argument, never to raise it again.

However, the government successfully argued that any preliminary injunction should not stop it from contracting with new, additional physicians and giving the agents a choice. Again, while the government spoke of the agents' "right to choose" it invoked no such legal principle. Instead, it argued that any obligation it had not to discriminate was trumped by a newly discovered statutory obligation to use multiple contractors if possible, and a supposed limit on the power of federal courts to interfere with a statutory right to contract freely. The injunction issued by the District Court prevented the government from terminating its contract with Dr. Doe, but it allowed new contracts with others. Not surprisingly, Dr. Doe's business plummeted.

Having succeeded with its "contracting" argument, the government never mentioned it again, although it would have provided a virtually complete defense to the action.

Nine months after the FBI first stopped using Dr. Doe, the case went to trial. Although the government continued to allude to a "right to know," it never succeeded in finding a legal principle to invoke in support of such a right. Instead, having argued that its contract rights trumped section 504, and that only federal employees could sue under it, it now argued that no one could sue the federal government under section 504 for anything. Once again, the government succeeded in convincing the District Court. Three months after the trial, the court ruled for petitioners on that basis.

A few days after the court entered judgment for petitioners, respondent's illness forced him to stop work, mooting his claim for equitable relief. Once that happened, the government, which argued in the trial court that equitable relief was inappropriate under *Sampson v. Murray*, 415 U.S. 61 (1974) since damages provided an adequate remedy, had a complete change of heart. For

the first time in the Court of Appeals, the government argued that damages were completely unavailable because the United States had not waived sovereign immunity.[3]

Once the Ninth Circuit rejected that defense, the FBI attempted to argue variously that Dr. Doe had a legal obligation to provide it with information about HIV which it said it did not want, or that it had asked for information which he did not give, or that it needed to know if he had AIDS to make unspecified "accommodations." Although it again succeeded in persuading the District Court on all of these points, it largely abandoned its first point, a legal argument, in the Court of Appeals, and ultimately failed on the others for simple lack of any support in the record at all.

Thus, by the end of this case, it was clear that, as respondent had said all along, he was complying with the guidelines promulgated by the federal government's Centers for Disease Control as they existed then (and now), he posed no risk, and he had done nothing wrong. The government had abandoned all of the arguments it made, successfully, to deprive him of meaningful interim equitable relief, and had abandoned most of the arguments with which it twice defeated his claim in the District Court.

Unfortunately, by this time, respondent was dead. Now the government has decided once again that far from being an adequate remedy, damages are unavailable, and it asks This Court to use its discretionary powers to minimize liability.

It is not at all uncommon to change legal arguments as a case proceeds; and since sovereign immunity is jurisdictional, the government had every right to raise it for

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[3] Although it dropped its argument that it could not be sued at all under section 504, the government did argue that it could only be sued under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

the first time on appeal. But it is one thing to say there is nothing improper in what a litigant has done; it is quite another to say that he or she deserves extraordinary intervention by This Court. This case should have ended long ago. This Court should not prolong it now.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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